TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914

No. [illegible] 117

[illegible] UNITED STATES, PLAINTIFF IN ERROR,

vs.

EBERT, BIRD, THAYER REALTY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED [illegible]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 981.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EMERY, BIRD, THAYER REALTY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation and service	a	1
Writ of error	d	1
Caption	1	2
Petition	2	2
Exhibit A. Articles of association of the Emery, Bird, Thayer Realty Co	14	10
B. Deed from Emery, Bird, Thayer Dry Goods Co. to Bird, Thayer Realty Co., February 1, 1908	21	14
C. Lease from Emery, Bird, Thayer Realty Co. to Emery, Bird, Thayer Dry Goods Co., February 1, 1908	26	18
D. Lease from Adams et al., trustees, to the Merchants' Building Association, April 11, 1890	31	20
E. Agreement between Mary S. Dickerson and the Emery, Bird, Thayer Dry Goods Co., March 1, 1905	39	26
F. Agreement between Mary S. Dickerson and the Emery, Bird, Thayer Dry Goods Co., March 14, 1905	43	28
G. Agreement between Mary S. Dickerson and the Emery, Bird, Thayer Dry Goods Co., April 10, 1905	45	29
H. Agreement between Mary S. Dickerson and the Emery, Bird, Thayer Dry Goods Co., October 7, 1907	48	31
I. Protest of the Emery, Bird, Thayer Realty Co., February 26, 1910	52	34
J. Notice of and demand for taxes assessed, May 6, 1910	53	34
K. Protest of the Emery, Bird, Thayer Realty Co., June 28, 1910	54	35
L. Protest of the Emery, Bird, Thayer Realty Co., February 21, 1911	55	36
M. Notice of assessment of special excise tax	56	36
N. Protest of the Emery, Bird, Thayer Realty Co., June 16, 1911	57	37

	Original.	Print.
Affidavit of service of petition	58	38
Record entry of filing of demurrer	59	38
Demurrer	60	39
Order submitting demurrer	61	39
Order overruling demurrer	61	40
Record entry of filing of answer	62	40
Answer	62	40
Record entry of filing of reply	65	42
Reply	66	42
Order of submission	67	43
Plaintiff's requests for findings of fact and conclusions of law filed	67	43
Record entry of filing of demurrer to evidence, etc	67	43
Defendant's demurrer to evidence	68	43
Defendant's request for findings of fact and conclusions of law	70	45
Defendant's request for modified findings of fact	79	50
Findings of fact and conclusions of law by the court	80	51
Judgment, July 27, 1912	92	59
Order allowing writ of error	93	59
Assignment of errors	94	60
Petition for writ of error	98	63
Præcipe for transcript	99	63
Findings of fact	100	64
Conclusions of law	110	71
Opinion	111	72
Clerk's certificate to transcript	119	77

a UNITED STATES OF AMERICA, *sct:*

To Emery, Bird, Thayer Realty Company, a corporation, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the 19th day of February, 1913, next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Western Division of the Western District of Missouri, wherein the United States of America is plaintiff in error and you are are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arba S. Van Valkenburgh, judge of the District Court of the United States for the Western Division of the Western District of Missouri, this 20th day of January, in the year of our Lord one thousand nine hundred and thirteen.

ARBA S. VAN VALKENBURGH,
Judge of the District Court for the Western District of Missouri.

b UNITED STATES OF AMERICA,
Western District of Missouri, ss:

We hereby acknowledge due service of the within citation this 20th day of January, A. D. 1913.

ALBERT R. STROTHER and
JAMES G. SMART,
Attorneys for Defendant in Error.

c (Indorsed:) United States District Court, Western District of Missouri, Western Division. United States of America, plaintiff in error, vs. Emery, Bird, Thayer Realty Company, defendant in error. Citation. Filed January 20, 1913. John B. Warner, clerk.

d UNITED STATES OF AMERICA, *sct:*

The President of the United States to the judge of the District Court of the United States for the Western Division of the Western District of Missouri, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you, between Emery, Bird, Thayer Realty Company, a corporation, plaintiff, and The United States of America, defendant, a manifest error hath happened, to the great damage of the said defendant, The United States of America, as by its complaint appears.

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 19th day of February, 1913, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 20th day of January, A. D. 1913. Issued at office in Kansas City, this 20th day of January, A. D. 1913.

[SEAL.] JOHN B. WARNER,
Clerk of the District Court of the United States
for the Western District of Missouri,
By ——— ———, *Deputy Clerk.*

e WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said District Court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court. Issued at office in Kansas City this 14th day of February, A. D. 1913.

[SEAL.] JOHN B. WARNER, *Clerk,*
By ——— ———, *Deputy Clerk.*

f (Indorsed:) United States District Court, Western District of Missouri, Western Division. United States of America, plaintiff in error, vs. Emery, Bird, Thayer Realty Company, defendant in error. Writ of error. Filed January 20, 1913. John B. Warner, clerk.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on the 10th day of February, A. D. 1912, a petition was filed in the office of the clerk of the District Court of the United States for the Western Division of the Western District of Missouri, in the case wherein The Emery, Bird, Thayer Realty Company, a corporation, is plaintiff and The United States of America is defendant.

Said petition is in words and figures as follows:

2 In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, plaintiff,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

Petition.

Now comes the Emery, Bird, Thayer Realty Company, a corporation, by its attorneys, and files this its petition in accordance with

the terms and provisions of an act of Congress entitled: "An act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, as amended by the Judicial Code of said United States, and for its cause of action states: That it is a corporation organized on the 14th day of January, 1908, under the laws of the State of Missouri, in such cases made and provided, and having its principal office and place of business and residence at Kansas City, in the county of Jackson and State of Misouri, in the western division of the western district of Missouri; that the purposes for which said plaintiff was organized as set forth in its articles of association, a copy whereof is hereto annexed and herewith filed and marked "Exhibit A" and made a part hereof, are as follows, to wit:

"Seventh. That the purposes for which this corporation is formed are the following, to wit:

"1. To acquire and hold the title to lots H, I, J, and K, in block twenty-three (23) in McGee's addition to the city of Kansas (now Kansas City), Missouri, and to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the fol-
3 lowing-described real estate situate in Kansas City, Missouri, to wit:

"The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas (now Kansas City); also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78), in said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street. Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78); running thence north on a line parallel to the west line of Grand Avenue in said city one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet, more or less, to the east line of said lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut Street in said city one hundred twenty-eight (128) feet, more or less, to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet, more or less, to the place of beginning. Said last mentioned strip of land having formerly been the south one hundred twenty-eight (128) feet of the alley running north and south through the block in said Swope's addition, bounded on the north by Tenth Street, on the east by Grand Avenue, on the south by Eleventh Street, and on the west by Walnut Street, said portion of said alley comprised in the boundaries of said strip aforesaid having been by the order and decree of the County Court of said Jackson County, made and entered May 6th, 1889, vacated as such. Said leasehold interest being the unexpired term of a lease of said last-described premises from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Lawrence Minot, trustees of the Boston Ground

Rent Trust to The Merchants Building Association, a corporation, said lease being dated the 11th day of April, 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds
4 of Jackson County, at Kansas City, Missouri, in Book B 423 at pages 184 and following, together with all the buildings and improvements situated upon all of said real estate and constituting a part thereof. And also to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following-described real estate situated in Kansas City, Jackson County, Missouri, to wit: Lot numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City), Missouri, said leasehold interest being the unexpired term of a lease of said last-described premises from Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company dated the 1st day of March, 1905, and recorded on the 4th day of March, 1905, in said office of the recorder of deeds of said Jackson County, Missouri, at Kansas City, in Book B 961, at page 22, as amended by an agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1107, at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1154, at page 66. And also to acquire and hold the leasehold interest of said Emery, Bird, Thayer Dry Goods Company in said last-described real estate under and by virtue of a certain other lease thereof to it from said Mary S. Dickerson, dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1108, at page 450.

"2. To carry out and perform all the terms, provisions, covenants, and agreements contained in said leases mentioned in paragraph '1' aforesaid, to be kept, carried out, and performed by the lessee and its successors and assigns, and for this purpose to make such contracts, to do such acts, and incur such indebtedness as may be necessary and proper therefor; to enforce the performance of all the terms, provisions, covenants, and agreements of said leases to be kept,
5 carried out, and performed by the lessors therein and their successors and assigns, and for this purpose to make such contracts, to do such acts, and institute and prosecute such suits as may be necessary and proper therefor.

"3. To lease the property described in paragraph '1' aforesaid and every part thereof to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms, and for such rental as may be from time to time mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rentals as will produce for the benefit of the stockholders of this corporation a net dividend upon the entire capital stock of this

corporation of at least six per cent per annum, free and clear of all costs, charges, and expenses of every kind whatsoever.

"4. To sell, assign, transfer, and convey the property described in paragraph '1' as aforesaid, and every and any part thereof, at such times, to such persons, and on such terms and at such prices as may be from time to time determined by an affirmative vote of not less than two-thirds of the entire capital stock of this corporation, cast at a stockholders' meeting legally held."

II.

That at the time of the organization and incorporation of plaintiff, as aforesaid, a certain other corporation, to wit, Emery, Bird, Thayer Dry Goods Company, was the owner of and in possession of the real estate, leasehold interests, buildings and improvements, and all the property described in said articles of incorporation of this plaintiff and as set out, as aforesaid; that said Emery, Bird, Thayer Dry Goods Company was and still is a corporation, organized under the laws of the State of Missouri, and having its office and principal place of business at Kansas City, in the county of Jackson and State of Missouri, and engaged in the business of buying and selling goods, wares, and merchandise in its department store in said Kansas City, and was using and occupying said property for the purposes of its said business;

That thereafter, and on, to wit, the day of February,
6 1908, said Emery, Bird, Thayer Dry Goods Company, in consideration of the sum of one dollar ($1.00) and other valuable considerations to it paid by the plaintiff herein, granted, bargained and sold, conveyed and confirmed unto the plaintiff herein all of its said property, real estate, buildings, and improvements, as aforesaid, by a certain warranty deed, a copy whereof is hereto annexed and herewith filed and marked "Exhibit B" and made a part hereof;

That after the execution of said warranty deed and the conveyance to plaintiff of said property by said Emery, Bird, Thayer Dry Goods Company, as aforesaid, and on, to wit, the day of February, 1908, this plaintiff demised and let all of said property, real estate, buildings, and improvements unto said Emery, Bird, Thayer Dry Goods Company for a term of twenty-five (25) years, beginning on the first day of January, 1908, and ending on the first day of January, 1933, at and for the annual rental of one hundred eight thousand ($108,000.00) dollars, payable in equal quarterly installments on or before the first days of January, April, July, and October of each and every year of said term, and for the further consideration of the promise and agreement of said Emery, Bird, Thayer Dry Goods Company to pay all the taxes on all the said premises during the continuation of said lease and also to keep all the buildings on said premises fully insured in good and solvent insurance companies, for the use and benefit of the plaintiff and in its name and also to pay all the rentals and charges falling due on the leasehold premises,

aforesaid, and to keep and perform all the obligations and conditions contained in said original leases of said premises to be kept and performed by the lessee therein and to save harmless plaintiff from all rentals, charges, and obligations, as appears by the said lease, a copy whereof is hereto annexed and herewith filed and marked Exhibit C and made a part hereof, and upon the execution of said lease, said Emery, Bird, Thayer Dry Goods Company, in pursuance thereof and thereunder entered into the possession of all of
7 said premises and continuously since that time, hitherto has been, and still is in the exclusive possession thereof, performing all the terms and obligations of said lease.

III.

That said leasehold interest under said lease from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Laurence Minot, trustees of the Boston Ground Rent Trust to The Merchants Building Association, mentioned in said articles of association of plaintiff, was and is the unexpired portion of the term of ninety-nine (99) years, beginning on the first day of April, 1890, as set forth in said lease, a copy whereof is hereto annexed and herewith filed and marked "Exhibit D" and made a part hereof; that said leasehold interest under said lease from Mary S. Dickerson, dated the first day of March, 1905, mentioned in said articles of association and under the agreements of extension thereof, mentioned therein, as aforesaid, was for the unexpired portion of the term of fifteen (15) years, expiring on the first day of March, 1920, as appears from a copy of said lease, hereto attached and herewith filed, marked "Exhibit E" and made a part hereof, and said agreement of modification, dated March 14, 1905, a copy whereof is hereto attached and herewith filed and marked "Exhibit F" and made a part hereof, and said agreement of extension, dated the 10th day of April, 1905, a copy of which is hereto attached and herewith filed and marked "Exhibit G" and made a part hereof; and that leasehold interest under the lease from said Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company was for a term of sixty-nine (69) years beginning on the first day of March, 1920, and ending on the first day of March, 1989, as appears from the lease from said Mary S. Dickerson, dated the 7th day of October, 1907, a copy whereof is hereto attached and herewith filed and marked "Exhibit H" and made a part hereof:

IV.

That heretofore, to wit, on the 26th day of February, 1910,
8 one C. G. Burton, the collector of the United States internal revenue for the sixth district of the State of Missouri, claiming to act under section 38 of the act of the Congress entitled "An act to provide revenue, equalize duties, and to encourage the industries of

the United States, and for other purposes," approved on the 5th day of August, 1909, and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1909, under the penalties therein provided for its failure therein so to do, required this plaintiff to make a return as required by said act and in the form provided therefor, and thereupon this plaintiff did on said 26th day of February, 1910, under protest make such return, showing its total income for the year 1909 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of one hundred eight thousand ($108,000.00) dollars, as aforesaid; that a copy of the protest made by this plaintiff to said collector at the time of making its said return is hereto annexed and herewith filed and marked "Exhibit I" and made a part hereof; that thereafter and on, to wit, the 6th day of May, 1910, said C. G. Burton, collector as aforesaid, served upon this plaintiff a certain notice of and demand for taxes assessed upon said return, a copy of which said notice and demand is hereto annexed and herewith filed, marked "Exhibit J" and made a part hereof, and that thereby said collector notified this plaintiff that it had been assessed upon its said return a tax under said act of Congress in the sum of one thousand thirty ($1,030.00) dollars, and that said tax would become due and payable on or before the 30th day of June, 1910, and that unless the same were paid it would become his duty to collect the same with a penalty of five (5%) per centum additional and interest at the rate of one (1%) per centum per month; that thereafter and on, to wit, the 28th day of June, 1910, this plaintiff paid to said collector said sum of one thousand thirty ($1,030.00) dollars, in payment of said tax and paid the same under protest, and at the time of said payment filed with said collector its written notice of protest to the effect that said
9 payment was unwillingly made and under protest and that said tax was illegal and invalid and improperly assessed, and that such payment was made under protest and only because of requirement of said collector and to prevent proceedings to compel the collection thereof, together with interest and penalties, as set forth in said notice and demand of said collector on the 6th day of May, 1910, aforesaid, and notifying said collector that this plaintiff intended to sue for the recovery of the money thereby paid, a copy of which said notice of protest is hereto annexed and herewith filed and marked "Exhibit K" and made a part hereof.

V.

That heretofore, to wit, on the 21st day of February, 1911, one C. G. Burton, the collector of the United States internal revenue for the sixth district of the State of Missouri, claiming to act under section 38 of the act of the Congress entitled "An act to provide revenue, equalize duties, and to encourage the industries of the United States, and for other purposes," approved on the 5th day of August, 1909, and claiming that plaintiff was required under the terms of said act

to make return of its income for the year 1910, under the penalties therein provided for its failure therein so to do, required this plaintiff to make a return as required by said act and in the form provided therefor, and thereupon this plaintiff did on said 21st day of February, 1911, under protest make such return, showing its total income for the year 1910 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of one hundred eight thousand ($108,000.00) dollars, as aforesaid; that a copy of the protest made by this plaintiff to said collector at the time of making its said return is hereto annexed and herewith filed and marked "Exhibit L" and made a part hereof; that thereafter and on, to wit, the day of March, 1911, said C. G. Burton, collector, as aforesaid, served upon this plaintiff a certain notice of and demand for taxes assessed upon said return, a copy of which said notice and demand is hereto attached and herewith filed, marked "Exhibit M" and made a part hereof, and that thereby said collector notified this plaintiff that it had been assessed upon its said return a tax under said act of Congress in the sum of one thousand thirty ($1,030.00) dollars, and that said tax would become due and payable on or before the 30th day of June, 1911, and that unless the same were paid it would become his duty to collect the same with a penalty of five (5%) per centum additional and interest at the rate of one (1%) per centum per month; that thereafter and on, to wit, the 16th day of June, 1911, this plaintiff paid to said collector said sum of one thousand thirty ($1,030.00) dollars in payment of said tax and paid the same under protest and at the time of said payment filed with said collector its written notice of protest to the effect that said payment was unwillingly made and under protest and that said tax was illegal and invalid and improperly assessed, and that such payment was made under protest and only because of requirement of said collector and to prevent proceedings to compel the collection thereof, together with interest and penalties, as set forth in said notice and demand of said collector on the day of March, 1911, aforesaid, and notifying said collector that this plaintiff intended to sue for the recovery of the money thereby paid, a copy of which said notice of protest is hereto annexed and herewith filed and marked "Exhibit N" and made a part hereof.

VI.

That after the payment of said two sums of one thousand thirty ($1,030.00) dollars each, aggregating the sum of two thousand sixty ($2,060.00) dollars, as aforesaid, to said collector of the internal revenue of the United States for the sixth district of Missouri the said collector paid the same over to the said United States, who have since retained and now retain the same; that said payments were made unwillingly and on compulsion and under duress for the purpose of avoiding the penalties provided by said act of Congress for a failure to pay the same, and also for the pur-

pose of preventing said collector from taking steps to collect the same, together with interest and penalties, as provided in said law, and from proceeding against this plaintiff and its property and levying upon its property, and to prevent the collection thereof by said collector in said manner as he was then and there threatening to do.

VII.

That the collection of said tax, as aforesaid, by said collector, was and is illegal and wrongful for the reason that this plaintiff was not at any time during the years 1909 and 1910 and 1911, or any of them, and is not now, a corporation, required by said act of Congress to make return of its income under said act of Congress and was not and is not liable to be assessed or compelled to pay said tax for the reason that during said years, and each of them, this plaintiff was not and is not now doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress and was not as a matter of fact engaged in or doing any business in said years 1909, 1910, and 1911, or any of them, and during said years did not, in fact, act in any corporate capacity except to hold the usual meetings of its stock-holders for the adoption of by-laws, for the election of its directors, and the usual meetings of its directors for the election of its officers and for the receipt of the rentals reserved under said lease from it to said Emery, Bird, Thayer Dry Goods Company of the property aforesaid, and the distribution of such rentals as dividends to its stock-holders in accordance with its said articles of association.

VIII.

That afterwards and on, to wit, the 30th day of June, 1911, this plaintiff filed with said collector its claim for a refund of said taxes,
so illegally assessed and collected from it, as aforesaid, which
12 said claim was by said collector transmitted and submitted
to the Commissioner of Internal Revenue, as provided by law and the regulations of the Secretary of the Treasury in such cases provided, and thereupon and thereby this plaintiff appealed to said Commissioner of Internal Revenue for a refund and repayment to it of said sum of two thousand sixty ($2,060.00) dollars, so illegally and wrongfully collected from it as aforesaid; that thereafter and on, to wit, the day of July, 1911, said collector refused and rejected said claim and every part thereof and refused to refund said sum of two thousand sixty ($2,060.00) dollars or any part thereof, so illegally and wrongfully collected from this plaintiff as aforesaid.

IX.

That by reason of the premises the right has accrued to this plaintiff to have and maintain this its petition and suit against said United States to recover from said United States said sum of two

thousand sixty ($2,060.00) dollars, the amount of said taxes, so illegally and wrongfully collected from it, as aforesaid, and this court has jurisdiction over this suit under the acts of said Congress in this behalf made and provided, as aforesaid;

Wherefore this plaintiff prays the judgment and decree of the court upon the facts and law aforesaid, and that it may have judgment that it is entitled to have and recover from said United States said sum of two thousand sixty ($2,060.00) dollars paid by it as aforesaid.

SMART & STROTHER,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, ss:

R. L. HAWKINS, of lawful age, being first duly sworn, upon his oath states that he is the treasurer of the Emery, Bird, Thayer Realty Company, a corporation, plaintiff in the foregoing petition and suit; that he knows the contents of said petition and that the mat-
13 ters and things therein set forth and contained are true, and further affiant saith not.

R. L. HAWKINS.

Subscribed and sworn to before me this 9th day of February, 1912. My commission expires on the 19 day of July, 1913.

[SEAL.] L. FRED EVANS,
Notary Public in and for Jackson County, Missouri.

14 EXHIBIT A.

ARTICLES OF ASSOCIATION.

Know all men by these presents that we, the undersigned, desirous of forming a corporation under the laws of Missouri, and more particularly under the provisions of Article IX, chapter 12, of the Revised Statutes of the year 1899, governing manufacturing and business companies, have entered into the following agreement:

First. That the name of this corporation shall be "The Emery, Bird, Thayer Realty Company."

Second. That this corporation shall be located in the city of Kansas City, county of Jackson, State of Missouri.

Third. That the amount of the capital stock of this corporation shall be one million eight hundred thousand ($1,800,000.00) dollars, divided into one thousand eight hundred (1,800) shares of the par value of one thousand ($1,000.00) dollars each, of which one million seven hundred and ninety-three thousand ($1,793,000.00) dollars shall be preferred stock, and seven thousand ($7,000.00) dollars shall be common stock; that the same has been bona fide subscribed and the whole thereof actually paid up in lawful money of the United States and is in the custody of the persons hereinafter named as the first board of directors. The preferences and priorities of the preferred stock shall be as follows, to wit:

The holders of the preferred stock shall be entitled to receive out of the earnings of the corporation, after the payment of its debts and expenses (such expenses, however, not to include any salary or compensation of any kind whatever, either directly or indirectly, to any of the directors or officers of this corporation), and this corporation shall be bound to pay thereon a noncumulative dividend at the rate of six per cent per annum, payable in equal quarterly installments on the 10th day of January, April, July, and October of each year before any dividends shall be set apart or paid on the common stock, and before any part of the earnings of this corporation
15 shall be set apart for a surplus fund, or for any fund in the nature of a surplus fund. It shall be the duty of the board of directors to declare and pay said dividend as above provided, and neither said board of directors nor any member thereof, nor any officer or officers of this corporation, shall be entitled to any salary or compensation of any kind, either directly or indirectly, until after the full payment of such dividend in each year. Nor shall said board of directors nor any member thereof, nor any officer or agent of this corporation whatever, have any power or authority to create or incur any debts or obligations of any kind for or on behalf of this corporation so as to impair or reduce the amount of said dividend, or in any way prevent or interfere with the full payment thereof, except those which may be strictly necessary to accomplish the purposes of this corporation as hereinafter set forth.

In case of the dissolution or liquidation of this corporation the holders of said preferred stock shall be entitled first to participate in the assets and property of every kind to be distributed until the full par value of said preferred stock is paid to the holders thereof before any part of said assets or property shall be paid to the holders of the common stock.

After the payment to the holders of the preferred stock of the dividends as aforesaid, the board of directors may declare and pay out of the earnings of this corporation a dividend to the holders of the common stock. And in case of the dissolution or liquidation of this corporation, after the payment in full of the par value of the preferred stock to the holders thereof as aforesaid, the holders of the common stock shall be entitled to receive the par value of such stock. After the payment of the par value of both the preferred and common stock as aforesaid, the balance, if any, of the assets and property of this corporation to be distributed shall be paid ratably to the holders of both the preferred and common stock.

16 Fourth. The names and places of residence of the several shareholders, and the number of shares of stock, both common and preferred, subscribed by each, are as follows:

COMMON STOCK.

Name.	Residence.	No. of shares.
William E. Emery	Flemington, New Jersey	One share.
Joseph T. Bird	Kansas City, Missouri	One share.
John C. Fennell	Kansas City, Missouri	One share.
Charles C. Peters	Kansas City, Missouri	One share.
Robert L. Hawkins	Kansas City, Missouri	One share.
Sallie C. Thayer	Kansas City, Missouri	One share.
George C. King	Kansas City, Missouri	One share.

PREFERRED STOCK.

Name.	Residence.	No. of shares.
William E. Emery	Flemington, New Jersey	Three hundred fifty-nine (359) shares.
Joseph T. Bird	Kansas City, Missouri	Seven hundred ninety-one (791) shares.
John C. Fennell	Kansas City, Missouri	Two hundred fifteen (215) shares.
Charles C. Peters	Kansas City, Missouri	One hundred forty-three (143) shares.
Robert L. Hawkins	Kansas City, Missouri	Seventy-one (71) shares.
Sallie C. Thayer	Kansas City, Missouri	One hundred ninety-seven (197) shares.
George C. King	Kansas City, Missouri	Seventeen (17) shares.

Fifth. The board of directors shall consist of five (5) shareholders and the following-named persons have been agreed upon for the first year: William E. Emery, Joseph T. Bird, John C. Fennell, Charles C. Peters, and Robert L. Hawkins.

Sixth. That this corporation is to continue for fifty (50) years.

17 Seventh. That the purposes for which this corporation is formed are the following, to wit:

1. To acquire and hold the title to lots "H," "I," "J," and "K," in block twenty-three (23) in McGee's addition to the city of Kansas (now Kansas City), Missouri, and to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following-described real estate situated in Kansas City, Missouri, to wit:

The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas (now Kansas City); also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78) in said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street. Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78), running thence north on a line parallel to the west line of Grand Avenue, in said city, one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet, more or less, to the east line of said lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut Street, in said city, one hundred twenty-eight (128) feet, more or less, to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet, more or less, to the place of beginning. Said last mentioned strip of

land having formerly been the south one hundred twenty-eight (128) feet of the alley running north and south through the block in said Swope's addition, bounded on the north by Tenth Street, on the east by Grand Avenue, on the south by Eleventh Street, and on the west by Walnut Street, said portion of said alley comprised in the boundaries of said strip aforesaid having been by the order and decree *if* the county court of said Jackson County, made and entered May 6th, 1889, vacated as such. Said leasehold interest being the unexpired term of a lease of said last-described premises from
18 John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Laurence Minot, trustees of the Boston Ground Rent Trust to the Merchants' Building Association, a corporation, said lease being dated the 11th day of April, 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds of Jackson County, at Kansas City, Missouri, in Book B 423, at pages 184 and following, together with all the building and improvements situated upon all of said real estate and constituting a part thereof. And also to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following described real estate situated in Kansas City, Jackson County, Missouri, to wit: Lot numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City), Missouri. Said leasehold interest being the unexpired term of a lease of said last-described premises from Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company dated the 1st day of March, 1905, and recorded on the 4th day of March, 1905, in the said office of the recorder of deeds of said Jackson County, Missouri, at Kansas City, in Book B 961, at page 22, as amended by an agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1107, at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1154, at page 66. And also to acquire and hold the leasehold interest of said Emery, Bird, Thayer Dry Goods Company in said last-described real estate under and by virtue of a certain other lease thereof to it from said Mary S. Dickerson dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1108, at page 450.

2. To carry out and perform all the terms, provisions, covenants, and agreements contained in said leases mentioned in para-
19 graph "1" aforesaid, to be kept, carried out, and performed by the lessee and its successors and assigns, and for this purpose to make such contracts, to do such acts, and incur such indebtedness as may be necessary and proper therefor; to enforce the performance of all the terms, provisions, covenants, and agreements of said leases to be kept, carried out, and performed by the lessors

therein, and their successors and assigns, and for this purpose to make such contracts, to do such acts, and institute and prosecute such suits as may be necessary and proper therefor.

3. To lease the property described in paragraph "1" aforesaid, and every part thereof, to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms, and for such rental as may be from time to time mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rental as will produce for the benefit of the stockholders of this corporation a net dividend upon the entire capital stock of this corporation of at least six per cent per annum, free and clear of all costs, charges, and expenses of every kind whatsoever.

4. To sell, assign, transfer, and convey the property described in paragraph "1" as aforesaid, and every and any part thereof, at such times, to such persons, and on such terms and at such prices as may be from time to time determined by an affirmative vote of not less than two-thirds of the entire capital stock of the corporation, cast at a stockholders' meeting legally held.

In testimony whereof we have hereunto set out hands this 9th day of January, 1908.

WILLIAM E. EMERY.
JOSEPH T. BIRD.
JOHN C. FENNELL.
CHARLES C. PETERS.
ROBERT L. HAWKINS.
SALLIE C. THAYER.
GEORGE C. KING.

20 STATE OF MISSOURI,
County of Jackson, ss:

On this ninth day of January, 1908, before me personally appeared Joseph T. Bird, John C. Fennell, William E. Emery, Charles C. Peters, Robert L. Hawkins, Sallie C. Thayer, and George C. King, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, the day and year above written.

My commission expires July 21st, 1909.

[SEAL.] L. F. EVANS,
Notary Public in and for Jackson County, Missouri.

21 EXHIBIT B.

This indenture, made on the first day of February, 1908, by and between Emery, Bird, Thayer Dry Goods Company, a corporation of the county of Jackson and State of Missouri, party of the first part, and The Bird, Thayer Realty Company, a corporation, of the same county and State, party of the second part,

Witnesseth that said party of the first part, in consideration of the sum of one ($1.00) dollar and other valuable considerations to it paid by the said party of the second part (the receipt of which is hereby acknowledged), does by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, its successors and assigns, the following described lots, tracts, or parcels of land lying, being, and situate in the county of Jackson and State of Missouri, to wit: All of lots H, I, J, and K in block twenty-three (23) in McGee's addition to the city of Kansas (now Kansas City), Missouri; and also the entire leasehold estate and interest of said first party in and to the following described real estate situate in Kansas City, Missouri, to wit: The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to Kansas City, Missouri; also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78) in said addition, except that portion of lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street; also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78); running thence north on a line parallel to the west line of Grand Avenue in said city one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet, more or less, to the east line of said lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut Street in said city one hundred and twenty-eight (128) feet, more or less, to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet, more or less, to the place of beginning; said
21 leasehold interest being the unexpired term of a lease of said last-described premises from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Lawrence Minot, trustees of the Boston Ground Rent Trust, to the Merchants Building Association, a corporation, said lease being dated the 11th day of April, 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds of Jackson County, at Kansas City, Missouri, in Book B 423, at page 184 and following, together with all the buildings and improvements situate upon all of said real estate and constituting a part thereof; and also the entire leasehold estate and interest of said party of the first part in and to the following described real estate situate in Kansas City, Jackson County, Missouri, to wit: Lot numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City), Missouri; said leasehold interest being the unexpired term of a lease of said last described premises from Mary S. Dickerson to said party of the first part dated the first day of March, 1905, and recorded on the first day of March, 1905, in said office of the recorder of deeds of Jackson County, Missouri, at Kansas City, in Book B 961, at page 22, as amended by an agreement between said Mary S. Dickerson and said party of the

first part dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1107, at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said party of the first part dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1154, at page 66, and also the entire leasehold estate and interest of said first party in and to the said lot seventy-five (75) in Swope's addition to Kansas City, Missouri; said leasehold interest being the unexpired term of the party of the first part in said last described real estate under and by virtue of a certain other lease thereof to and from said Mary S. Dickerson dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1108, at page 450.

To have and to hold the premises aforesaid, with all and
23 singular the rights, priviliges, appurtenances, and immunities thereto belonging or in any wise appertaining to the said party of the second part, and unto its successors and assigns forever, the said party of the first part hereby convenanting that it is lawfuliy seized of an indefeasible estate in fee in the premises herein first above described and conveyed, to wit: Lots H, I, J, and K, in block twenty-three (23), of McGee's addition to Kansas City, Missouri, and a leasehold estate and interest in all the other premises herein conveyed; that it has good right to convey the same, and that the said premises are free and clear from any encumbrance done or suffered by it or those under whom it claims, and that it will warrant and defend the title to the said premises unto the said party of the second part and unto its successors and assigns forever against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said party of the first part has caused these presents to be signed by its president and attested by its secretary under the corporate seal of said party of the first part at Kansas City, this 1st day of February, 1908.

EMERY, BIRD, THAYER DRY GOODS COMPANY,
By W. E. EMERY, *President.*

Attest:
C. C. PETERS, *Secretary.*

STATE OF NEW YORK, *County of New York, ss:*

On this sixth day of February, 1908, before me, a notary public within and for the county of New York, State of New York, appeared W. E. Emery, to me personally known, who, being by me duly sworn, did say that he is the president of the Emery, Bird, Thayer Dry Goods Company, of Kansas City, Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of direc-
24 tors, and the said W. E. Emery acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof witness my hand and notarial seal at my office in New York City, this sixth day of February, 1908. My commission expires March 30th, 1909.

[SEAL.] ANTHONY VEVERKA,
Notary Public in and for State of New York,
County of New York.

25 STATE OF MISSOURI, *County of Jackson, ss:*

Be it known that the foregoing warranty deed from Emery, Bird, Thayer Dry Goods Company, a corporation, to The Emery, Bird, Thayer Realty Company, a corporation, dated the first day of February, 1908, has this day been approved and accepted by said The Emery, Bird, Thayer Realty Company, a corporation, including the assignment and transfer of the lease, and leasehold interest and estate thereby created, from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Laurence Minot, trustees of the Boston Ground Rent Trust to the Merchants Building Association, a corporation, dated the 11th day of April, 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds of Jackson County, Missouri, at Kansas City, in Book B 423, at page 184 and following, the engagements of the lessee under said lease being hereby assumed by said The Emery, Bird, Thayer Realty Company, a corporation.

In witness whereof said The Emery, Bird, Thayer Realty Company has caused its corporate name to be hereto signed by its president and its corporate seal to be hereto affixed, attested by its secretary this 1st day of February, 1908.

[SEAL.] THE EMERY, BIRD, THAYER REALTY CO.,
By J. T. BIRD, *President*

Attest:
C. C. PETERS, *Secretary.*

STATE OF MISSOURI, *County of Jackson, ss:*

On this 21st day of February, 1908, before me, L. F. Evans, a notary public within and for said county and State, appeared J. T. Bird, to me personally known, who, being by me duly sworn, did say that he is the president of The Emery, Bird, Thayer Realty Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said J. T. Bird acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office in Kansas City, Missouri, the day and year herein first above written. My commission expires July 21st, 1909.

[SEAL.] L. F. EVANS,
Notary Public in and for Jackson County, Missouri.

26

EXHIBIT C.

LEASE.

This indenture of lease, made on the first day of February, 1908, by and between The Emery, Bird, Thayer Realty Company, a corporation of the county of Jackson, State of Missouri, party of the first part, and the Emery, Bird, Thayer Dry Goods Company, a corporation of the county of Jackson, State of Missouri, party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred and eight thousand ($108,000) dollars per year, to be paid by the party of the second part as hereinafter provided, and other considerations hereinafter specified, has this day let and leased, and does by these presents demise, let, and lease, unto the said party of the second part for the term of twenty-five (25) years, said term beginning on the first day of January, 1908, and ending on the first day of January, 1933, the following described real estate situate in the county of Jackson and State of Missouri, to wit:

All of lots H, I, J, and K, in block twenty-three (23), in McGee's addition to Kansas City, Missouri, and all the buildings and improvements thereon in their present condition, and also the south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas (now Kansas City), Missouri, and all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78) in said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street; and also a strip of land described as follows: Beginning at the southwest corner of said lot seventy-eight (78); running thence north on a line parallel to the west line of Grand Avenue in said city one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet, more or less, to the east line of said
27 lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut Street in said city one hundred and twenty-eight (128) feet, more or less, to the southeast corner of said lot numbered forty-seven; thence east sixteen and one-half (16½) feet, more or less, to the place of beginning; and also lot numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City), Missouri, and all the buildings and improvements situate on said lots, in the present condition thereof.

And the said party of the second part, in consideration of the leasing and the occupancy of said premises, does hereby promise and agree and obligate itself to pay unto the said party of the first part the sum of one hundred and eight thousand ($108,000) dollars per year for said premises for each and every year during the continu-

ance of this lease, to wit, from the first day of January, 1908, until the first day of January, 1933, and to pay the same in equal quarterly installments, to wit: The sum of twenty-seven thousand ($27,000) dollars on or before the 5th days of January, April, July, and October in each and every of said years; and the said party of the second part does further promise and agree and obligate itself to pay all the taxes on all of said premises during the continuance of this lease, and also to keep all of the buildings on said premises fully insured in good and solvent insurance companies for the use and benefit of the party of the first part and in its name, and also promises and agrees to pay all the rentals and charges falling due on the leasehold premises herein leased, and to keep and perform all the obligations and conditions contained in the original leases of said premises, to be kept and performed by the lessee therein, and to save harmless the party of the first part from all such rentals, charges, and obligations.

Should said party of the second part fail, neglect, or refuse to pay the rental herein reserved for a period of fifteen (15) days after the same shall become due and payable, or fail, neglect, or refuse to keep and perform the other obligations contained in this
28 lease, then and in that event said party of the first part shall have the right and privilege to enter upon and take possession of said premises, but for this cause the obligation to pay rent shall not cease.

And the said party of the second part does further promise and agree to keep said premises in good repair during the entire term of this lease and to keep the same free from all nuisances and to return the same to the party of the first part at the termination of this lease in as good condition as they are at present, ordinary wear and tear and the acts of Providence excepted. Said party of the second part shall have the right to alter, change, or remodel any and all of such premises in such manner as it may deem proper at its own expense, provided such changes or alterations shall not damage or injure said buildings. In case of the destruction of said buildings by fire or otherwise, said party of the first part agrees to rebuild said buildings in substantially as good condition as they are at present, with such changes, alterations, and modifications as may be agreed upon between the parties hereto, with all reasonable dispatch and diligence, and the party of the second part shall continue to pay rent during the rebuilding and reconstruction of said buildings for a period of not exceeding one year, provided such rebuilding and reconstruction shall consume that much time; if the rebuilding and reconstruction of said premises should consume more than one year's time, then, and in that event, the party of the second part shall pay no rent on said buildings after the expiration of one year until said premises are ready for occupany.

In witness whereof said party of the first part and said party of the second part have caused these presents to be signed in duplicate by their respective presidents and attested by their respec-

29 tive secretaries under the corporate seal of said respective corporations.

THE EMERY, BIRD, THAYER REALTY COMPANY, [SEAL.]
By J. T. BIRD, *President.*

Attest:
C. C. PETERS, *Secretary.*

EMERY, BIRD, THAYER DRY GOODS COMPANY, [SEAL.]
By W. E. EMERY, *President.*

Attest:
C. C. PETERS, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this sixth day of February, 1908, before me, a notary public within and for said county and State, appeared W. E. Emery, to me personally known, who being by me duly sworn did say that he is the president of the Emery, Bird, Thayer Dry Goods Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said W. E. Emery acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof witness my hand and notarial seal at my office in New York City the day and year first above written.

My commission expires March 30th, 1909.

[SEAL.] ANTHONY VEVERKA,
Notary Public, New York County, New York.

STATE OF MISSOURI, *County of Jackson, ss:*

On this 3rd day of February, 1908, before me, a notary public within and for the county and State above named, appeared J. T. Bird, to me personally known, who, being by me duly sworn, did say that he is the president of the Emery, Bird, Thayer Realty Company, and that the seal affixed to the foregoing instrument
30 is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said J. T. Bird acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof witness my hand and notarial seal at my office in Kansas City the day and year first above written.

My commission expires July 21st, 1909.

[SEAL.] L. F. EVANS,
Notary Public, Jackson County, Missouri.

31 EXHIBIT D.

This indenture, made this 11th day of April, A. D. 1890, by and between John Quincy Adams, Moses Williams, Charles E. Cotting,

William Minot, jr., and Laurence Minot, trustees of the Boston Ground Rent Trust, under an indenture dated July 20, 1889 recorded in the office of the recorder of deeds for Jackson County, Missouri, in Book B, #389, page 390, parties of the first part, hereinafter designated as lessors, and The Merchants Building Association, a corporation created and existing under and by virtue of the laws of the State of Missouri, party of the second part, hereinafter designated as lessee, each party hereby acknowledging the receipt of a valuable consideration from the other, and acting herein in further consideration of the engagements of the other party hereby made.

Witnesseth, that the said lessors have, and by these presents do, demise and lease unto the said lessee certain premises situate in Kansas City, county of Jackson and State of Missouri, described as follows, to wit:

The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas, now Kansas City; also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78), in said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49), heretofore condemned for the purpose of widening Walnut Street.

Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78), running thence north on a line parallel to the west line of Grand Avenue in said city one hundred twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76), thence west sixteen and one-half (16½) feet more or less to the east line of said lot numbered forty-nine (49), thence south on a line parallel to the east line of Walnut Street in said city one hundred twenty-eight (128) feet more
32 or less to the southeast corner of said lot numbered forty-seven (47), thence east sixteen and one-half (16½) feet more or less to the place of beginning.

Said last mentioned strip of land having formerly been the south one hundred twenty-eight (128) feet of the alley running north and south through the block in said Swope's addition, bounded on the north by Tenth Street, on the east by Grand Avenue, on the south by Eleventh Street, and on the west by Walnut Street, said portion of said alley comprised in the boundaries of said strip aforesaid having been by the order and decree of the county court of said Jackson County made and entered May 6, 1889, vacated as such, being the same premises this day conveyed to said trustees by deed of said The Merchants Building Association of even date and to be recorded herewith.

To have and to hold said premises for and during the term of ninety-nine (99) years from the first day of April, A. D. eighteen hundred and ninety, said lessee yielding and delivering rent as hereafter stated.

Said lessee covenants and agrees to erect on said land a building according to the plans and specifications of Messrs. Van Brunt &

Howe, architects, signed by both parties hereto; to cost not less than four hundred thousand ($400,000) dollars; to be completed and ready for occupation on or before December 31, 1890, free from all liens.

Said lessee covenants and agrees to deliver to the lessors, as yearly rental for said demised premises, at such office of the lessors or their agent, or at such bank, in said city of Kansas City or in the city of New York or in the city of Boston, as the lessors may from time to time designate, thirty-three thousand dollars ($33,000) in gold coin of the United States of the present standard of weight and fineness, in four quarterly yearly installments, each in advance, of eight thousand two hundred and fifty dollars ($8,250) each, on the first days of April, July, October, and January, in each and every year during the first four years of this lease, the first delivery
33 to be made on the first day of April, 1890. Eighty thousand dollars ($80,000) in such gold coin in four installments, as follows, namely: Fifty-seven thousand five hundred dollars ($57,500) on the first day of April, 1894, seven thousand five hundred dollars ($7,500) on the first day of July, 1894; seven thousand five hundred dollars ($7,500) on the first day of October, 1894; and seven thousand five hundred dollars ($7,500) on the first day of January, 1895, during the fifth year of this lease. Seventy-seven thousand dollars ($77,000) in such gold coin in four installments as follows, namely: Fifty-six thousand seven hundred and fifty dollars ($56,750) on the first day of April, 1895; six thousand seven hundred and fifty dollars ($6,750) on the first day of July, 1895; six thousand seven hundred and fifty dollars ($6,750) on the first day of October, 1895; six thousand seven hundred and fifty dollars ($6,750) on the first day of January, 1896, during the sixth year of this lease. Seventy-four thousand dollars ($74,000) in such gold coin in four installments as follows, namely: Fifty-six thousand dollars ($56,000) on the first day of April, 1896; six thousand dollars ($6,000) on the first day of July, 1896; six thousand dollars ($6,000) on the first day of October, 1896; and six thousand dollars ($6,000) on the first day of January, 1897, during the seventh year of this lease. And five hundred and Fifty-seven thousand two hundred and eighty (557,280) grains of pure unalloyed gold, in four quarter-yearly installments, each in advance, of one hundred and thirty-nine thousand three hundred and twenty (139,320) grains each, on the first days of April, July, October, and January in each and every year during the remaining ninety-two (92) years of said period of ninety-nine (99) years, the first delivery of such pure gold to be made on the first day of April, 1897.

Provided, however, that the lessors may from time to time, at their option, require in lieu of any such quarter-yearly delivery of pure, unalloyed gold, the payment, at the time and place appointed
34 for such delivery, of the sum of six thousand dollars ($6,000) in such lawful currency of the country as the lessors may designate.

The lessee covenants and agrees to comply with all public laws and ordinances applicable to the premises, and not to suffer any nuisance thereon. And said lessee covenants and agrees to punctually pay, and to indemnify and save harmless the lessors, said ground, the premises demised and the improvements from all taxes, charges, assessments, liens, penalties, and claims for damages chargeable to or payable for or in respect of said ground, demised premises, or improvements during said term, and to furnish said lessors with evidence, duly certified, that all such claims are duly satisfied, it being expressly understood and agreed that the lessee shall have no authority, express or implied, to create any lien upon, or bind the interest of the lessors in, the demised premises or the improvements thereon.

The lessee covenants and agrees not to assign this lease until after the completion of said building, not until after the ground and the building about to be erected thereon are free and discharged of all liens, claims, and charges incurred in or about or during the construction of said buildings unless the lessors shall to such assignments expressly in writing consent; and it is agreed that any sale, assignment, or conveyance by said lessee, without lessors' consent, before the expiration of said period shall be void.

The lessee further covenants and agrees not to assign this lease at any time, except with the lessors' consent in writing, unless the rent and all taxes, charges, assessments, liens, penalties, and claims for damages which the lessee has herein covenanted to discharge have been duly discharged and satisfied; nor unless the assignee shall expressly assume the lessee's engagements hereunder; nor unless the lessors shall have had first placed in their hands for inspection, during a period of ten days, the legal and sufficient instru-
35 ments of assignment and acceptance, nor unless by instruments recorded at or about the time of delivery in the proper recorder's office.

Provided, however, that the lessee may at any time, directly or by conveyance in trust for that purpose, mortgage its estate in the premises to secure any actual debt, and may make one-half of the insurance on said improvements payable, in case of loss, to such trustee or mortgagee, but until the payments herein required of lessee during the first six years of this lease (including the payment of $56,000 on the first day of April, 1896) have been made all the insurance of every kind upon said improvements shall be made payable to the lessors, and upon destruction of any of the improvements on said land or damage thereto all moneys due or payable by way of insurance or indemnity shall, until said payment of $56,000 on the first day of April, 1896, has been made, be and remain a security and pledge for the payments herein required, and unless said moneys are otherwise payable to lessors said moneys are hereby made payable to them. All moneys paid to lessors by way of insurance or indemnity shall, both before said payment of the first of April, 1896, as well as

after that date, be applied, as hereinafter provided, to the reconstruction or restoration of the buildings under plans approved by them.

It is agreed that any assignment, except by devise, made not in accordance with the above stipulations shall be void.

It is agreed that after absolute sale, by such assignment so made, in compliance with the terms hereof, the party theretofore lessee shall be free from all further liability hereunder.

The lessee covenants and agrees to keep all improvements upon said premises insured for their full insurance value, in offices satisfactory to lessors, and to furnish the lessors with a complete list of all such insurance and receipts for the premiums paid thereon; and all insurance, except so much, not exceeding one-half, as may be payable to a mortgagee, shall, if the lessors so require, be made payable to the lessors and be held by them.

36 The lessee covenants and agrees, in case of damage or destruction, from time to time, by fire or otherwise, to repair, restore, or rebuild the improvements upon plans to be approved by the lessors with all reasonable despatch, and in any event within eighteen months from the time of such loss or damage.

The lessors agree, in case of loss by fire or otherwise, to apply any insurance money recovered by, or paid to, them to the reconstruction of restoration of the buildings under plans approved by them; provided that all insurance money recovered and not paid to said lessors shall be first so applied.

In case said lessee shall not rebuild or restore said premises within eighteen months, or in case that for any lawful cause the lessors shall have terminated this lease before the expiration of such eighteen months, then such insurance money recovered by the lessors shall remain with them, forfeited, as damages liquidated.

In case the premises, or any part thereof, shall be at any time, during the term of this lease, taken or condemned by any public authority for any public use, the damages shall be apportioned between the lessors and the lessee, in case of dispute, by three disinterested parties, one chosen by the lessors, one chosen by the lessee, and a third by the two so chosen, the award of a majority of whom shall be final.

It is agreed that all buildings, fixtures, and improvements shall be and remain the property of the lessors, and the said lessee covenants and agrees upon the expiration or lawful determination of this lease to yield up the same, in good condition and repair, without any compensation therefor.

The lessee covenants and agrees to pay and to indemnify the lessors from all legal costs and charges, including counsel fees, lawfully and reasonably incurred in or about the premises in the defense of any suit, in discharging the premises from any lien, judgment, or incumbrance, or in obtaining possession after default of the

37 lessor, or expiration of the term hereof.

The lessors may at reasonable times enter upon and view the premises.

It is agreed that all the covenants, agreements, and engagements hereunder shall be construed as covenants running with the ground, and shall be construed as accruing to and binding upon the successors, heirs, and assigns of the lessors and upon the successors and assigns of the lessee.

This lease is made upon the condition that the lease shall punctually keep and perform all its covenants and agreements hereunder; and in case it fails to keep and perform any of its covenants or agreements hereunder, then and in that case this lease shall be void, at the lessors' option, and the lessors may thereupon, without further demand or notice, enter upon said premises and take possession thereof and of all improvements thereon, forcibly if necessary, without being guilty of trespass; and after such possession or demand for such possession by the lessors, the lessee shall be deemed guilty of forcible entry and detainer, and subject to such summary action as may be provided by law for recovery of leased premises; but notwithstanding such entry by the lessors, or any summary process that they may bring, the lessee shall be and remain responsible for all liabilities theretofore incurred under its covenants and agreements, and until possession restored, or regained by or delivered to, the lessors, shall be liable at the lessors' option either to satisfy all the terms hereunder or to pay the full rental value of said land and the improvements thereon from the time of default until full actual possession by the lessors of the premises.

No waiver of any covenant hereunder shall be a waiver of any succeeding breach of the same covenant.

In testimony whereof said parties of the first part have
38 hereunto and to one other original instrument of like tenor and date set their hands and seals, and the party of the second part has caused the same to be signed by its president, attested by its secretary, and its corporate seal to be affixed on the day and year first above written.

In presence of—

J. Q. ADAMS, [SEAL.]
MOSES WILLIAMS, [SEAL.]
CHAS. E. COTTING, [SEAL.]
WILLIAM MINOT, Jr., [SEAL.]

By MOSES WILLIAMS, *His Atty.*

LAURENCE MINOT, [SEAL.]
Trustees of the Boston Ground Rent Trust.

THE MERCHANTS BUILDING ASSOCIATION,
[SEAL.] By T. B. BULLENE, *President.*

Attest:
WM. B. THAYER, *Secretary.*

Duly acknowledged by all parties and recorded in the office of the recorder of deeds of Jackson County, Missouri, at Kansas City, in Book B No. 423, at page 184.

39 EXHIBIT E.

LEASE.

This article of agreement, made and entered into by and between Mary S. Dickerson, party of the first part, hereinafter termed the lessor, and Emery, Bird, Thayer Dry Goods Company, a corporation, party of the second part, hereinafter termed the lessee.

Witnesseth, that the said lessor has leased and does by these presents lease to the said lessee lot numbered seventy-five (75) of Swope's addition to Kansas City, Missouri, and the building located thereon, known as and numbered 1016 and 1018 Grand Avenue, Kansas City, Missouri, for the term of ten (10) years, beginning on the first day of March, 1905, and ending on the first day of March, 1915, on the following terms and conditions, to wit:

For the use and rent of said building for the period beginning on the first day of March, 1905, and ending on the first day of March, 1910, said lessee, Emery, Bird, Thayer Dry Goods Company, hereby promises to pay to said lessor, Mary S. Dickerson, or her agent, six thousand ($6,000.00) dollars per year, payable in equal monthly installments of five hundred ($500.00) dollars per month, in advance on the first day of each and every calendar month, beginning on the first day of March, 1905, at the office of C. D. Clingan.

For the period beginning March 1st, 1910, and ending March 1st, 1915, said lessee hereby promises to pay the said lessor, Mary S. Dickerson, or to her agent, eight thousand ($8,000.00) dollars per year, payable in equal monthly installments of six hundred and sixty-six and 66/100 ($666.66) dollars per month, in advance, on the first day of each and every calendar month, beginning March 1st, 1910, at the office of C. D. Clingan.

Lessee promises that it will not convey or assign this lease without the written consent of said lessor, nor allow any business to be conducted on said premises contrary to the laws of the State of Missouri or to the ordinances of Kansas City, Missouri.

40 It is hereby covenanted and agreed by and between lessor and lessee that said lessee shall have the right to make at it own expense such alterations, improvements, and additions to said building as it may see fit at any time during the term of this lease. Said lessee promises and agrees that all repairs, alterations, and improvements of whatsoever kind or nature, including repairs and renewals to the roof, skylights, window lights, gutters, down spouts, fire shutters, plumbing, sewers, heating apparatus, ceilings, walls, floors, and sidewalks, shall be made at the sole expense of lessee and without charge to the said lessor, or the real estate aforesaid or buildings thereon, or additions to such buildings, and agrees to exhibit to the said lessor or to her agent, at their request, receipts and other evidence of satisfaction showing payment of any alteration, improvements, additions, and repairs of said building.

And in consideration of this lease the said lessee promises and agrees, at its own expense, to add not less than two (2) and not more than three (3) additional stories to the building now on said premises, the said additional stories to be of a substantial character and built and constructed in all respects in compliance with the ordinance of Kansas City, Missouri, in relation to buildings.

And it is hereby stipulated and agreed that the said additional stories to be added to said building by said lessee shall not be less than eleven (11) feet and not more than fourteen (14) feet in height, from floor to ceiling; it being the purpose and intent of said lessee to make said additional stories conform as nearly as may be with the building now occupied by the lessee immediately south of and adjoining the premises herein leased.

And it is hereby further stipulated and agreed that said additional stories when constructed shall become a part of the realty and shall become the property of the said lessor.

And the said lessor promises and agrees to pay all the taxes of every kind and character which may be assessed against said
41 premises during the continuance of this lease, and at her own expense to keep said building and the additions thereto fully insured in good, safe, and reliable companies during the continuance of this lease.

And in the event of the partial or total destruction of said building by fire or otherwise during the continuance of this lease, then and in that event the said lessor, at the request of the said lessee, promises and agrees, with all convenient speed and dispatch, to repair or rebuild and reconstruct said building, and place the same in substantially the same condition as before the fire or injury to the same; and the said lessor promises and agrees to use and employ the total amount of money carried in insurance upon said building in repairing or rebuilding and reconstructing the same, or so much of said money as may be necessary to replace said building in substantially the same condition as before the injury or destruction thereof.

And in such case the said lease shall continue in full force and effect, but the said lessee shall not pay rent on the same during the time occupied in repairing or rebuilding and reconstructing said building, but said rent shall commence as soon as said building is repaired or rebuilt and in a suitable condition for occupancy. In case of partial destruction, however, and lessee continues to occupy part not injured, it shall pay rent with such abatement as shall be just and proper. But should said lessee not elect to have said building repaired or rebuilt and reconstructed, then the said lessee may, at its option, surrender said lease, and the obligation to pay rent shall cease from the date of such surrender.

Lessee promises that it will take good care of the building and additions thereto, and promises to keep the same in good repair, free from filth, from danger of fire, or any nuisance.

Lessee agrees that if it violates or fails to comply with any of the substantial provisions of the lease, or makes default of any payment of any monthly installment of rent for twenty (20) days after it is due, it will at the written request of said lessor, surrender to
42 said lessor, or to her agent, the peaceful possession of said premises, but its obligation to pay the aforesaid rent shall not cease, and finally at the end of its said term, it will surrender to said Mary S. Dickerson, her heirs and assigns, the peaceful possession of said building, and any additions thereto, and premises, with all the keys, bolts, and latches in good condition, ordinary wear and tear and providential destruction and destruction by fire excepted.

In witness whereof the parties hereto have executed this lease in duplicate, one copy to be retained by each of the parties hereto, and each of the copies to be an original, this 1st day of March, 1905.

MARY S. DICKERSON.
EMERY, BIRD, THAYER DRY GOODS COMPANY,
[SEAL.] By J. T. BIRD, *Vice Pres.*

STATE OF MISSOURI, *County of Jackson, ss:*

On this third day of March, 1905, before me personally appeared Mary S. Dickerson, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed, and the said Mary S. Dickerson further declares herself to be single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office in Kansas City, Missouri, the day and year first above written.

CHARLES D. CLINGAN, [SEAL.]
Notary Public, Jackson County, Missouri.

My term expires June 6th, 1907.

43 EXHIBIT F.

This article of agreement, made and entered into this 14th day of March, 1905, by and between Mary S. Dickerson, of the county of Jackson, State of Missouri, party of the first part, and Emery, Bird, Thayer Dry Goods Company, a corporation, party of the second part,

Witnesseth, that whereas said party of the first part did on the first day of March, 1905, by her certain instrument in writing, lease and let unto the said party of the second part lot numbered seventy-five (75) in Swope's addition to Kansas City, Missouri, and the building located thereon known as numbers 1016–1018 Grand Avenue, Kansas City, Missouri, for the term of ten years beginning on the first day of March, 1905, and ending on the first day of March, 1915; and

Whereas in said written lease it was provided among other things that "the said lessee promises and agrees at its own expense to add not less than two and not more than three additional stories to the building now on said premises;" and

Whereas it was further stipulated and agreed that the "said additional stories to be added to said building by said lessee shall not be less than eleven feet and not more than fourteen feet in height from floor to ceiling;"

Whereas it has been definitely ascertained by the said lessee that in order to make said additional stories conform with the building now occupied by the lessee immediately south of and adjoining the premises herein leased, it will be necessary to have one or more of said additional stories not more than ten feet in height from floor to ceiling;

Now, therefore, it is hereby expressly stipulated and agreed by and between the parties hereto that said written lease dated March 1st, 1905, between the parties hereto, shall be and is hereby so modified as to provide as follows, to wit:

"And it is hereby stipulated and agreed that the said additional stories to be added to said building by said lessee shall not be less than ten (10) feet and not more than fourteen (14) feet in height from floor to ceiling."

44 And said lease shall in all other respects be continued in full force and effect as therein written.

In testimony whereof the parties hereto have executed this supplemental agreement in duplicate, one copy to be retained by each of the parties hereto, and each of the copies to be an original, this 14th day of March, 1905.

MARY S. DICKERSON.

EMERY, BIRD, THAYER DRY GOODS COMPANY,
By J. T. BIRD, *Vice Pres.*

STATE OF MISSOURI, *County of Jackson, ss:*

On this 15th day of March, 1905, before me, Charles D. Clingan, a notary public within and for said county and State, personally appeared Mary S. Dickerson, to be known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed, and the said Mary S. Dickerson further declared herself to be single and unmarried.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in Kansas City, Missouri, the day and year first hereinabove written.

My term expires June 6, 1907.

CHARLES D. CLINGAN, [SEAL.]
Notary Public in and for Jackson County, Missouri.

45 EXHIBIT G.

This article of agreement made and entered into by and between Mary S. Dickerson, of the county of Jackson, State of Missouri, party of the first party, and Emery, Bird, Thayer Dry Goods Company, a corporation, of the same county and State, party of the second part,

Witnesseth, that whereas said party of the first part did, on the first day of March, 1905, by her certain instrument in writing, lease and let unto the said party of the second part lot numbered seventy-five (75) in Swope's addition to Kansas City, Missouri, and the buildings thereon, known as numbers 1016 and 1018 Grand Avenue, Kansas City, Missouri, for the term of ten years, beginning on the first day of March, 1905, and ending on the first day of March, 1915, at and for the price and sum of six thousand ($6,000.00) dollars per year for the first five years of said term, payable in equal monthly installments of five hundred dollars per month, in advance, on the first day of each and every calendar month, beginning on the first day of March, 1905; and for the second five years of said term the sum of eight thousand ($8,000) dollars per year, payable in equal monthly installments of $666.66 per month, in advance, on the first day of each and every calendar month, beginning on the first day of March, 1910, at the office of C. D. Clingan; and

Whereas it is desired by both the party of the first part and party of the second part to extend the said lease for an additional period of five years:

Now, therefore, it is hereby expressly stipulated and agreed by and between the said party of the first and said party of the second part that the said written lease dated the first day of March, 1905, shall be, and is hereby, extended for an additional period of five (5) years, said additional period to begin on the first day of March, 1915, and to terminate on the first day of March, 1920; and the said party of the second part hereby binds and obligates itself to pay unto the said party of the first part as rental for said additional period the sum of eight thousand five hundred ($8,500) dollars per year,
46 the said sum to be paid in equal monthly installments of seven hundred and eight and 33-1/3/100 ($708.33-1/3) dollars per month, in advance, on the first day of each and every calendar month, beginning March 1st, 1915, at the office at C. D. Clingan; and the said original lease, dated March 1st, 1905, and the amendment thereto, dated March 14, 1905, shall continue and remain in full force and effect as in said lease and amendment provided.

In witness whereof the said parties have hereunto set their hands and seals to this supplemental agreement in duplicate, one copy to be retained by each of the parties hereto, and each of the copies to be an original, this 10th day of April, 1905.

MARY S. DICKERSON.
EMERY, BIRD, THAYER DRY GOODS CO.,
By J. T. BIRD, *V. P.*

STATE OF MISSOURI, *County of Jackson, ss:*

On this 10th day of April, 1905, before me, Charles D. Clingan, a notary public within and for said county and State, personally appeared Mary S. Dickerson, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed; and the said

Mary S. Dickerson further declared herself to be single and unmarried.

In witness whereof I have hereunto set my hand and affixed my notarial seal at my office in Kansas City, Missouri, the day and year herein first above written. My term expires June 6th, 1907.

CHARLES D. CLINGAN,
Notary Public, Jackson County, Missouri.

47 I, Mary S. Dickerson, of the county of Jackson, State of Missouri, do hereby consent that the Emery, Bird, Thayer Dry Goods Company may sell, assign, convey, and transfer to The Emery, Bird, Thayer Realty Company the certain lease executed to the said Emery, Bird, Thayer Dry Goods Company by me, dated March 1st, 1905, leasing to said company lot seventy-five (75) of Swope's addition to Kansas City, Missouri, for the period of ten (10) years beginning the first day of March, 1905, and ending on the first day of March, 1915, and extended by agreement dated April 10th, 1905.

In testimony whereof witness my hand this 8th day of February, 1908.

MARY S. DICKERSON.

Attest:
C. D. CLINGAN.

48 EXHIBIT H.

This article of agreement, made and entered into this 7th day of October, 1907, by and between Mary S. Dickerson of the county of Jackson, State of Missouri, party of the first part, hereinafter termed the lessor, and Emery, Bird, Thayer Dry Goods Company, a corporation of the county of Jackson and State of Missouri, party of the second part, hereinafter termed the lessee.

Witnesseth, that the said lessor has this day let and leased and does by these presents let, lease, and demise to the said lessee lot No. seventy-five (75) of Swope's addition to Kansas City, and the building located thereon, known as and numbered 1016 and 1018 Grand Avenue, Kansas City, Missouri, being the same property now occupied by the said lessee under a lease executed by the lessor expiring the first day of March, 1920, for the term of sixty-nine (69) years, said term beginning on the first day of March, 1920, and ending on the first day of March, 1989, on the following terms and conditions, to wit:

For the use and rent of said building and premises for the period beginning on the first day of March, 1920, and ending on the first day of March, 1930, the said lessee hereby promises and agrees to pay to the said lessor Mary S. Dickerson or her agent, heirs, administrator, or assigns the sum of nine thousand ($9,000) dollars per year for each and every of said years, payable in equal monthly installments of seven hundred and fifty ($750) dollars per month in

advance, on the first day of each and every calendar month beginning on the first day of March, 1920, and ending on the first day of March, 1930, at the office of any bank in Kansas City, Missouri, designated by the said lessor, her agent, administrator, executor, or assigns; for the period beginning March 1st, 1930, and ending March 1st, 1989, said lessee hereby promises and agrees to pay to the said lessor Mary S. Dickerson or to her agent, administrator, executor, or assigns ten thousand ($10,000) dollars per year, payable in equal monthly installments of eight hundred thirty-three and 33⅓/100 ($833.33⅓) dollars per month in advance on the first day of each and every calendar month, beginning March 1st, 1930, and ending March 1st, 1989, at the office of any bank in Kansas City, Missouri, designated by the said Mary S. Dickerson, her agent, administrator, executor, heirs, or assigns.

Said lessee promises and agrees, in addition to the rental herein reserved to be paid, to pay off and discharge all taxes, State and county and municipal, and all special taxes and assessments which shall be legally levied against said lot and improvements, and become a lien thereon from and after the first day of March, 1920, until the first day of March, 1989; and the said lessor binds and obligates herself, her executors, administrators, heirs, and assigns, to pay off and discharge all taxes, State and county and municipal, and all special taxes and assessments which shall be and constitute a lien against said lot and premises on the first day of March, 1920.

It is herein expressly covenanted and agreed by and between the said Mary S. Dickerson, her heirs, executors, administrators, and assigns, that the said lessee, its successors and assigns, shall have the right to repair, alter, or remodel, or enlarge in such manner as it or its successors may deem advisable, any building or structure which may be located on the said lot at the beginning of this lease, and it, and its successors and assigns, shall have the right and authority to tear down and remove such building for the purpose of rebuilding the same, and to use any and all of the materials in said building in the construction and erection of any new building which it or its successors or assigns shall deem proper to build and construct on said lot.

The said lessor binds herself, her heirs, executors, administrators, and assigns to pay off and discharge any encumbrance or encumbrances now a lien upon said property on or before the first day of March, 1920, and to deliver said premises to said parties of the second part at that time free and clear of all liens and encumbrances of every nature or kind whatsoever; and the said lessor, for herself, her heirs, executors, administrators, and assigns, hereby authorizes and empowers the said lessee, its successors, and assigns to pay off and discharge any debt, mortgage, deed of trust, or any other encumbrance which may be a lien on said lot and buildings upon the failure, neglect, or refusal of said lessor, her heirs, administrators, executors, or assigns to pay off and discharge the same, and upon such payment the said lessee, its successors, and assigns shall become subrogated to all the rights and privileges of the owners of said debt,

mortgage, deed of trust, or other encumbrance, and shall have the right and privilege of applying the accruing rentals of said premises to the payment and discharge of any such indebtedness which may thus incur, or shall have the right and privilege of suing and collecting the same by such legal proceedings as they may see proper to adopt.

In testimony whereof the said party of the first part has subscribed her name hereto, and the said party of the second part has caused its corporate name to be hereto signed by J. T. Bird, its vice president, and its corporate seal to be hereto affixed, attested by C. C. Peters, its secretary, to duplicate copies hereto, both to be original.

MARY S. DICKERSON.

EMERY, BIRD, THAYER DRY GOODS CO.,

[SEAL.] By J. T. BIRD, *V. P.*

Attest:

EMERY, BIRD, THAYER DRY GOODS CO.,

By C. C. PETERS, *Secretary.*

51 STATE OF MISSOURI, *County of Jackson, ss:*

On this 7th day of October, 1907, before me, a notary public, in and for said county, personally appeared Mary S. Dickerson, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. And the said Mary S. Dickerson further declares herself to be single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office in said county, the day and year first above written.

My term expires June 7, 1911.

[SEAL.] CHARLES D. CLINGAN,

Notary Public, Jackson County, Missouri.

STATE OF MISSOURI, *County of Jackson, ss:*

On this 8th day of October before me appeared J. T. Bird to me personally known, who, being by me duly sworn, did say that he is the vice president of the Emery, Bird, Thayer Dry Goods Company, a corporation created and existing under and by virtue of the laws of the State of Missouri, and that the seal affixed to said foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said J. T. Bird acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my notarial seal at my office in said county the day and year first above written.

My term expires July 21st, 1909.

[SEAL.] L. F. EVANS, *Notary Public.*

52 EXHIBIT I.

KANSAS CITY, MISSOURI, *Feby. 26, 1910.*

To the collector of United States internal revenue for the sixth district of the State of Missouri, Kansas City, Missouri:

The undersigned, The Emery, Bird, Thayer Realty Company, a corporation, herewith makes return of its net income received during the year beginning January 1st, 1909, and ending December 31st, 1909, upon the blank furnished by you for that purpose, and in the form demanded by you.

In making this return, the undersigned protests that it is under no legal obligation whatever to make such return, or any return whatever, of its net annual income, or to furnish any of the information called for in such return.

The undersigned further specifically protests that its entire income is derived solely from the rents of land and real estate belonging to it, and, for this specific reason, in addition to other reasons, it is not required to make any return of its said income.

The undersigned further specifically protests that, in no event, is it required to make any return of its net annual income for the year 1909, prior to the 5th day of August, 1909, and it makes herewith (under protest, to the same effect as herein stated, for the whole year of 1909) a separate return of its net income for that part of the year 1909 beginning with the 5th day of August, 1909, and ending December 31st, 1909.

The undersigned, therefore, submits its return unwillingly, under protest, and solely for the purpose of avoiding the penalties, or attempted enforcement of the penalties, mentioned in section 38 of the act of Congress approved August 5th, 1909, and entitled "An act to provide revenue and equalize duties and to encourage the industries of the United States, and for other purposes," which section the undersigned claims to be unconstitutional and void.

Respectfully submitted.

J. C. FENNELL, *Vice President.*
R. L. HAWKINS, *Treasurer.*

53 EXHIBIT J.

NOTICE OF AND DEMAND FOR TAXES ASSESSED.

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
6th District, State of Missouri, May 6, 1910.

($1,030.00. List for month of Mar., 1910. Div. ——.)

EMERY, BIRD, THAYER REALTY CO.,
Kansas City, Mo.

You are hereby notified that a tax, under the internal-revenue laws of the United States, amounting to one thousand thirty dollars, the

same being a tax upon excise tax on corporations, has been assessed against you by the Commissioner of Internal Revenue, and transmitted by him to me for collection. Demand is hereby made for this tax. *This tax is due and payable on or before the* This tax is due and payable on or before June 30, 1910, and unless paid it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

Payment may be made to collector at Kansas City. Checks must be certified.

C. G. BURTON, *Collector.*

Bring this notice with you.

54 EXHIBIT K.

KANSAS CITY, MISSOURI, *June 28, 1910.*

To the collector of the United States internal revenue for the sixth district of the State of Missouri, Kansas City, Missouri:

DEAR SIR: The undersigned, Emery, Bird, Thayer Realty Company, a corporation, herewith hands you its certified check, numbered 45555, on the National Bank of Commerce, of this city, payable to your order, for the sum of six hundred twelve and 70/100 ($612.70) dollars, and also its certified check, numbered 6949, on the First National Bank of this city, payable to your order for the sum of four hundred seventeen and 30/100 ($417.30) dollars, said checks together aggregating the sum of one thousand and thirty dollars ($1,030.00), in payment of the tax on corporations, assessed against it by the Commissioner of Internal Revenue, under section 38 of the act of Congress, approved August 5th, 1909, and entitled "An act to provide revenue and equalize duties and to encourage the industries of the United States, and for other purposes."

And the undersigned makes this payment unwilling and under protest.

The undersigned claims and asserts that said section is unconstitutional and void and said tax is illegal and invalid, and illegally and improperly assessed; and the undersigned pays the same only under protest and only because of the requirement of the department and to prevent proceedings to compel collection and for interest and penalty, as threatened in your communication of May 6th, 1910.

The undersigned particularly protests that the said tax is illegal and invalid, and is illegally and improperly assessed so far as it includes the tax on the net annual income of the undersigned prior to the 5th day of August, 1909.

The undersigned further specifically protests that its entire income is derived solely from the rents of land and real estate belonging to it, and for this specific reason, in addition to other reasons, it protests that the tax assessed against its income derived from the rental of real estate is illegal, invalid, and wrongful.

And the undersigned pays the same only under protest and for the reasons above given, and the undersigned hereby notifies you that it intends to sue for the recovery of the money hereby paid.

EMERY, BIRD, THAYER REALTY COMPANY,
By J. T. BIRD, *President.*

55 EXHIBIT L.

KANSAS CITY, MISSOURI, *Feby. 21, 1911.*

To the collector of United States internal revenue for the sixth district of the State of Missouri, Kansas City, Missouri:

The undersigned, the Emery, Bird, Thayer Realty Company, a corporation, herewith makes return of its net income received during the year beginning January 1st, 1910, and ending December 31st, 1910, upon the blank furnished by you for that purpose and in the form demanded by you.

In making this return the undersigned protests that it is under no legal obligation whatever to make such return, or any return whatever, of its net annual income, or to furnish any of the information called for in such return.

The undersigned further specifically protests that its entire income is derived solely from the rents of land and real estate belonging to it, and for this specific reason, in addition to other reasons, it is not required to make any return of its said income.

The undersigned therefore submits its returns unwillingly, under protest, and solely for the purpose of avoiding the penalties, or attempted enforcement of the penalties, mentioned in section 38 of the act of Congress approved August 5th, 1909, and entitled "An act to provide revenue and equalize duties and to encourage the industries of the United States, and for other purposes," which section the undersigned claims to be unconstitutional and void.

Respectfully submitted.

THE EMERY, BIRD, THAYER REALTY CO.,
By J. T. BIRD, *President.*

56 EXHIBIT M.

NOTICE OF ASSESSMENT OF SPECIAL EXCISE TAX.

TREASURY DEPARTMENT,
UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
6th District, State of Missouri.

(List, month of Feb., 1911. Page 54, line 36. $1,030.00.)

EMERY, BIRD, THAYER REALTY CO.,
Kansas City:

You are hereby notified that a special excise tax, under the provisions of section 38 of the act of Congress approved August 5, 1909, amounting to ten hundred thirty and no/100 dollars, has been as-

sessed against the above-named corporation, association, or company by the Commissioner of Internal Revenue and transmitted to me for collection. This tax is due and payable on or before the thirtieth day of June next.

Payment may be made to collector at Kansas City.

C. G. BURTON, *Collector.*

Bring this notice with you.

57 EXHIBIT N.

KANSAS CITY, MISSOURI, *June 16, 1911.*

To the collector of the United States internal revenue for the sixth district of the State of Missouri, Kansas City, Missouri.

DEAR SIR: The undersigned, Emery, Bird, Thayer Realty Company, a corporation, herewith hands you its certified check, numbered 48458, on the National Bank of Commerce, of this city, payable to your order, for the sum of six hundred and twenty dollars, and also its certified check, numbered 9950, on the First National Bank of this city, payable to your order, for the sum of four hundred and ten dollars, said checks together aggregating the sum of ten hundred and thirty ($1,030.00) dollars, in payment of the tax on corporations assessed against it by the Commissioner of Internal Revenue under section 38 of the act of Congress approved August 5th, 1909, and entitled "An act to provide revenue and equalize duties and to encourage the industries of the United States, and for other purposes."

And the undersigned makes this payment unwillingly and under protest.

The undersigned claims and asserts that said section is unconstitutional and void and said tax is illegal and invalid and illegally and improperly assessed, and the undersigned pays the same only under protest and only because of the requirement of the department and to prevent proceedings to compel collection and for interest and penalty, as threatened in your communication of ———.

The undersigned further specifically protests that its entire income is derived solely from the rents of land and real estate belonging to it, and for this specific reason, in addition to other reasons, it protests that the tax assessed against its income, derived from the rental of real estate, is illegal, invalid, and wrongful.

The undersigned further specifically protests that it was not at any time during the year for which said tax was assessed and is not now doing business in a corporate capacity within the true intent and meaning of said section 38, and for this specific reason, in addition to other reasons, it protests that the tax assessed against its income is illegal, invalid, and wrongful.

And the undersigned pays the same only under protest and for the reasons above given. And the undersigned hereby notifies you that it intends to sue for the recovery of the money hereby paid.

EMERY, BIRD, THAYER REALTY COMPANY,
By J. T. BIRD, *President.*

58 Afterwards, to wit, on the 10th day of February, 1912, an affidavit of service of petition was filed. Said affidavit is in words and figures as follows:

In the United States District Court for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, a corporation, plaintiff,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

UNITED STATES OF AMERICA,
State of Missouri, County of Jackson, ss:

A. R. Strother, of lawful age, being first duly sworn, upon his oath says that, acting for and on behalf of the Emery, Bird, Thayer Realty Company, a corporation, plaintiff in the above-entitled cause, he served upon Leslie J. Lyons, district attorney of the United States for the western district of Missouri, wherein said suit is brought, a true copy of the petition in said suit filed by the plaintiff therein in said district court by delivering said true copy to said Leslie J. Lyons in Kansas City, in the county of Jackson and State of Missouri, and in said western division of the western district of Missouri, on the 10th day of February, 1912. Affiant further states that on said 10th day of February, 1912, he also mailed a true copy of said petition to George W. Wickersham, the Attorney General of the United States, by placing such copy in an envelope, duly sealed, addressed to said George W. Wickersham, Attorney General of the United States, Washington, District of Columbia, and placing upon said envelope full prepaid postage and by having said envelope so addressed registered and paying the registration fee
59 therefor, as provided by law, and depositing the same, so addressed, prepaid, and registered, in the post office of the United States of America at Kansas City, Jackson County, Missouri. And further affiant saith not.

A. R. STROTHER,

Subscribed and sworn to before me this 10th day of February, 1912. My commission expires on the 16th day of January, 1915.

[SEAL.] DAVID O. SMART,
Notary Public in and for Jackson County, Missouri.

Afterwards, to wit, on the 11th day of April, 1912, the following entry appears of record:

EMERY, BIRD, THAYER REALTY CO.
vs. } 3821.
UNITED STATES OF AMERICA.

This day comes the defendant by Leslie J. Lyons, United States attorney, and files a demurrer herein.

Said demurrer is in words and figures as follows:

60 In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, plaintiff,
vs.
UNITED STATES OF AMERICA, DEFENDANT. } No. 3821.

Demurrer.

Now comes the defendant, the United States of America, by Leslie J. Lyons, United States attorney for the Western District of Missouri, and demurs to the petition filed herein and for grounds thereof states:

(1) That this suit is brought under the provisions of chapter two (2), section twenty-four (24), paragraph twenty (20), of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the provisions of section two (2) of the act of Congress approved March 3, 1887, chapter three hundred and fifty-nine (359), 24 Statutes at Large, page 505, the provisions of which have no reference to a claim of the kind and character described in plaintiff's petition and give the plaintiff no right to sue the defendant, the United States of America, as is sought in this action to do.

(2) That the cause of action set forth in plaintiff's petition arises out of the administration of the internal revenue laws of the United States, and this court is without jurisdiction to consider the subject matter thereof.

(3) That this court has no jurisdiction of this suit.

(4) That plaintiff has brought its suit against the wrong party.

(5) That plaintiff should have brought its suit against the collector of internal revenue for the sixth district of Missouri instead of the United States of America.

61 (6) That the petition does not state facts sufficient to constitute a cause of action.

Whereof plaintiff prays the court to dismiss said petition and for its costs.

LESLIE J. LYONS,
United States Attorney.

Afterwards, to wit, on the 22nd day of April, 1912, the following entry appears of record:

EMERY, BIRD, THAYER REALTY CO.
vs.
UNITED STATES. } 3821

This day the demurrer, heretofore filed herein, coming on for hearing, arguments of counsel are heard, the same is submitted, and by the court taken under advisement.

Afterwards, to wit, on the 9th day of May, 1912, the following entry appears of record:

EMERY, BIRD, THAYER REALTY CO.
vs.
UNITED STATES. } 3821

Now the demurrer heretofore submitted to the court and taken under advisement, now the court being fully advised in the premises, it is ordered that said demurrer be overruled, and further that the defendant be granted ten days in which to answer.

62 Afterwards, to wit, on the 16th day of May, 1912, the following entry appears of record:

EMERY, BIRD, THAYER REALTY CO.
vs.
UNITED STATES. } 3821

This day comes defendant by the district attorney and files answer herein.

Said answer is in words and figures as follows:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. ——.

Answer.

Now comes the United States of America by Leslie J. Lyons, United States attorney for the western district of Missouri, and for its answer to the petition filed herein states:

1. That it has no knowledge or information concerning the organization and incorporation of the plaintiff, or the purposes for which it was incorporated, or the business that it is carrying on; that it has no information of the ownership of the real estate described in the petition, or of the agreements, contracts, leases, or leasehold interests set forth therein, or of the terms, provisions, and requirements thereof, and therefore denies each and every allegation

63 therein contained relative to said matters and things, and prays the court to require strict proof thereof; that it has no knowledge or information concerning the organization and incorporation of the Emery, Bird, Thayer Dry Goods Company, or of its business, ownership, and possession of the property, agreements, contracts, leases, and leasehold interests alleged to have been held by it, nor of the purpose of its organization and the transferring and conveying of its real-estate holdings, properties, leases, and leasehold interests

to the plaintiff herein, as set forth in said petition, and therefore denies each and every allegation therein contained relating to said matters and things, and prays the court to require plaintiff to make strict proof thereof; that it has no knowledge or information concerning the terms, provisions, and requirements of the various contracts, leases, and agreements entered into between the Emery, Bird, Thayer Dry Goods Company and the plaintiff herein, and therefore denies each and every allegation in said petition contained relative to said leases, contracts, and agreements between said companies, and prays the court to require plaintiff to make strict proof thereof; that it has no knowledge or information concerning the leasehold interests, leases, contracts, and agreements from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, junior, and Lawrence Minot, trustees of Boston Ground Rent Trust, to the Merchants Building Association, or of the leases, contracts, and agreements made by said plaintiff, or any of the aforementioned parties with Mary S. Dickerson, and therefore denies each and every allegation relating thereto, and prays the court to require plaintiff to make strict proof thereof.

Second. For further answer to said petition plaintiff admits that on the 26th day of February, 1910, and the 21st day of February, 1911, and at all the times mentioned in the fourth and fifth divisions of paragraphs of plaintiff's petition, C. G. Burton was the
64 duly appointed, qualified, and acting collector of the United States internal revenue for the sixth district of the State of Missouri, and that he did collect the taxes mentioned in said fourth and fifth sections or paragraphs of said petition alleged, under the provisions of section 38 of the act of Congress entitled "An act to provide revenue, equalize duties, and to encourage the industries of the United States, and for other purposes," approved August 5th, 1909, but denies that the collection of said taxes was illegal and invalid, and that they were improperly assessed, and denies each and every other material allegation contained in said sections or paragraphs four and five of said petition.

Third. For further answer said defendant admits that the plaintiff paid the taxes and moneys mentioned in sections or paragraphs six, seven, and eight of said petition under protest, but denies each and every other allegation in said sections or paragraphs contained.

Fourth. For other and further answer defendant states that the plaintiff company is organized for profit and is subject to the provisions of section 38 of the act of Congress entitled "An act to provide revenue, equalize duties, and to encourage the industries of the United States, and for other purposes," approved August 5th, 1909, and that under the terms and provisions of said statute said company is required to make return of its income required by said act and the rules and regulations of the Secretary of the Treasury, and is required to pay the taxes provided for in said act, and as assessed and collected by the collector of internal revenue for the sixth district of Missouri, and that the assessment and collection of said taxes were in

all respects lawful and in accordance with the terms and provisions of said act of Congress and the rules and regulations of the Secretary of the Treasury of the United States.

65 Fifth. For other and further answer defendant states that this suit is brought under the provisions of chapter 2, section 24, paragraph 20, of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3rd, 1911, and the provisions of section 2 of the act of Congress approved March 3, 1887, chapter 359, 24 Statutes at Large, page 505, the provisions of which have no reference to a claim of the kind and character described in plaintiff's petition, and give the plaintiff no right to sue the defendant, the United States of America, as is sought in this action to do; that the cause of action set forth in plaintiff's petition arises out of the administration of the internal-revenue laws of the United States, and this court is without jurisdiction to consider the subject matter thereof; that this court has no jurisdiction of this suit; that plaintiff has brought this suit against the wrong party; that plaintiff should have brought its suit against the collector of revenue for the sixth district of Missouri, instead of the United States of America.

For other and further answer to said petition defendant denies each and every material allegation therein contained.

Wherefore, having fully answered, defendant prays to be dismissed with its costs.

(Signed) LESLIE J. LYONS,
United States Attorney.

Afterwards, to wit, on the 18th day of May, 1912, the following entry appears of record:

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION,
vs.
THE UNITED STATES OF AMERICA. } 3821.

This day comes plaintiff by its attorneys and files reply therein.

66 Said reply is in words and figures as follows:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 3821.

Reply.

Now comes The Emery, Bird, Thayer Realty Company, a corporation, plaintiff in the above-entitled cause, by its attorneys, and for

its reply to the answer of the defendant in said cause, and particularly to the 4th paragraph of said answer, denies each and every allegation, matter, and thing in said 4th paragraph contained, and for further reply to said answer, and particularly to the 5th paragraph thereof, plaintiff admits that this suit is brought under the provisions of chapter 2, section 24, paragraph 20 of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the provisions of section 2 of the act of Congress approved March 3, 1887, chapter 359, 24 Statutes at Large, page 505, but plaintiff denies each and every other allegation, matter, and thing in said 5th paragraph of said answer contained, and plaintiff reaffirms all the allegations of its said petition and prays judgment as therein prayed for.

SMART & STROTHER,
Attorneys for Plaintiff.

67 Afterwards, to wit, on the 22nd day of June, 1912, the following entry appears of record:

EMERY, BIRD, THAYER REALTY CO.
vs.
UNITED STATES. } 3821.

Now on this day come the parties, by their attorneys, the plaintiff appearing by Smart & Strother and the Government by Leslie J. Lyons, United States attorney; thereupon evidence was heard and the cause submitted to the court and by the court taken under advisement.

Afterwards, to wit, on June 22, 1912, plaintiff's requests for findings of fact and conclusions of law was filed.

Afterwards, to wit, on the 9th day of July, 1912, the following entry appears of record:

EMERY, BIRD, THAYER REALTY CO.
vs.
UNITED STATES. } 3821.

This day comes defendant by Leslie J. Lyons, United States attorney, and files demurrer; also files requests for findings of fact and conclusions of law.

Said demurrer filed herein on the 9th day of July, 1912, is in words and figures as follows:

68 In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, PLAINTIFF,
v.
UNITED STATES OF AMERICA, DEFENDANT. } No. 3821.

Demurrer.

At the close of the testimony offered by plaintiff herein the United States of America requests the court to find for the United States of

America and against the plaintiff herein and to dismiss this suit, because under the pleadings and testimony the plaintiff is not entitled to recover for the following reasons:

(1) Because this suit is brought under the provisions of chapter 2, section 24, paragraph 20 of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, 36 Stat. at Large, 1087, l. c. 1093, and under the provisions of section 2 of the act of Congress approved March 3, 1887, chapter 359, 24 Stat. at Large, 505, 2 Fed. Stat. Anno., 40, l. c. 82, the provisions of which have no reference to a claim of the kind and character described in plaintiff's petition.

(2) Because this is a suit arising out of the administration of the internal revenue laws of the United States, and is brought under the provisions of the acts above mentioned, which said acts give the plaintiff no right to use the defendant, the United States of America.

(3) Because the claim sued on herein arises out of the administration of the internal revenue laws of the United States, to wit, section 38 of the act of Congress entitled "An act to provide revenue, equalize duty, and to encourage the industries of the United States, and for other purposes," approved August 5, 1909, 36 Stat. at Large, 11, l. c. 112, and this court is without jurisdiction to consider the subject matter thereof.

69 (4) Because this court has no jurisdiction of this suit.

(5) Because the plaintiff has brought its suit against the wrong party.

(6) Because the plaintiff should have brought its suit against the collector of internal revenue for the sixth district of Missouri instead of the United States of America.

(7) Because in the trial of this suit the court is sitting as a court of claims and not otherwise, and is, therefore, without jurisdiction to hear and determine the claims of the kind and character sued on in this petition.

(8) Because the plaintiff herein is a corporation organized for profit under the laws of the State of Missouri, authorized to manage and rent real estate, and is managing and renting the real estate described in said petition and referred to in the testimony, and receiving and distributing the rentals accruing therefrom and authorized by its charter to improve, manage, and control said property and enjoy the rents and profits therefrom.

LESLIE J. LYONS,
U. S. Attorney.

Defendant's request for findings of fact and conclusions of law filed herein July 9, 1912, is in words and figures as follows:

70 In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT. } No. 3821.

Defendant's request for findings of fact and conclusions of law.

The defendant in the above-entitled cause, considering the facts hereinafter set forth proven, and deeming them material to the due presentation of this case in findings of fact, requests the court to find the facts as follows, to wit:

1. That the Emery, Bird, Thayer Realty Company at all the times in the petition and testimony mentioned was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and that its principal office and place of business is at Kansas City, Jackson county, Missouri, in the Western Division of the Western District of Missouri.

2. That the purposes for which plaintiff was organized are (1) To acquire and hold the title to lots "H," "I," "J," and "K" in block twenty-three (23), in McGee's addition to the city of Kansas (now Kansas City), Missouri, and to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following-described real estate situate in Kansas City, Missouri, to wit:

The south thirty-two (32) feet of lot numbered forty-nine (49), in Swope's addition to the city of Kansas (now Kansas City); also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78), in
71 said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street. Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78); running thence north on a line parallel to the west line of Grand Avenue, in said city, one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet more or less to the east line of said lot numbered forty-nine (49); thence south, on a line parallel to the east line of Walnut Street, in said city, one hundred twenty-eight (128) feet more or less to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet, more or less, to the place of beginning. Said last-mentioned strip of land having formerly been the south one hundred and twenty-eight (128) feet of the alley running

north and south through the block in said Swope's addition, bounded on the north by Tenth Street, on the east by Grand Avenue, on the south by Eleventh Street, and on the west by Walnut Street, said portion of said alley comprised in the boundaries of said strip aforesaid having been, by the order and decree of the County Court of said Jackson County, made and entered May 6th, 1889, vacated as such. Said leasehold interest being the unexpired term of a lease of said last described premises from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Lawrence Minot, trustees of the Boston Ground Rent Trust, to The Merchants Building Association, a corporation, said lease being dated the 11th day of April, 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds of Jackson County, Missouri, at Kansas City, Missouri, in Book B 423, at pages 184 and following, together with all the buildings and improvements situated upon all of said real estate and constituting a part thereof. And also to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following-described real estate situated in Kansas City, Jackson County, Missouri, to wit: Lot
72 numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City), Missouri. Said leasehold interest being the unexpired term of a lease of said last-described premises from Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company, dated the 1st day of March, 1905, and recorded on the 4th day of March, 1905, in said office of the recorder of deeds of said Jackson County, Missouri, at Kansas City, in Book B 961, at page 22, as amended by an agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1107, at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book 1154, at page 66. And also to acquire and hold the leasehold interest of said Emery, Bird, Thayer Dry Goods Company in said last-described real estate under and by virtue of a certain other lease thereof to it from said Mary S. Dickerson, dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1108, at page 450.

2. To carry out and perform all the terms, provisions, covenants, and agreements contained in said leases mentioned in paragraph "1" aforesaid, to be kept, carried out, and performed by the lessee and its successors and assigns, and for this purpose to make such contracts, to do such acts and incur such indebtedness as may be necessary and proper therefor; to enforce the performance of all the terms, provisions, covenants, and agreements of said lease to be kept, carried out, and performed by the lessors therein and their successors and assigns, and for this purpose to make such contracts; to do such

acts and institute and prosecute such suits as may be necessary and proper therefor.

3. To lease the property described in paragraph "1" aforesaid and every part thereof to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms, and for such rental as may be, from time to time, mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rentals as will produce, for the benefit of the stockholders of this corporation, a net dividend upon the entire capital stock of this corporation of at least six per cent per annum, free and clear of all costs, charges, and expenses of every kind whatsoever.

73

4. To sell, assign, transfer, and convey the property described in paragraph "1" as aforesaid, and every and any part thereof, at such times, to such persons and on such terms and at such prices as may be from time to time determined by an affirmative vote of not less than two-thirds of the entire capital stock of this corporation, cast at a stockholders' meeting legally held.

3. That at the time of the organization and incorporation of the plaintiff, and for a long time prior thereto, a certain other corporation, to wit, Emery, Bird, Thayer Dry Goods Company, was the owner of and in possession of the real estate, leasehold, interest, buildings, and improvements, and all the property described in the articles of incorporation of the plaintiff, and that the said Emery, Bird, Thayer Dry Goods Company is and was at all the times mentioned in the petition and testimony engaged in the retail dry goods business, buying and selling merchandise at wholesale and retail, and conducting a department store at Kansas City, Missouri.

4. That at all the times mentioned in the petition and testimony, the Emery, Bird, Thayer Dry Goods Company was, and still is, using and occupying the property, leasehold interest, buildings, and improvements under the terms and provisions of a certain lease between it and the plaintiff herein, a copy thereof being attached to the petition filed herein and marked "Exhibit C," and that said premises, leasehold interest, buildings, improvements, and property were and are being used for the purposes of conducting its business as a department store.

74

5. That on the first day of February, 1908, the plaintiff, in compliance and harmony with the purposes of its incorporation, and under the powers granted to it as such corporation, acquired from the Emery, Bird, Thayer Dry Goods Company, by warranty deed, all of the property mentioned in the articles of incorporation of said plaintiff, and has ever since held the same for its use, benefit, and profit, a copy of said warranty deed being attached to the petition herein marked "Exhibit B."

6. That on the same day, to wit, the first day of February, 1908, the said plaintiff, for the purpose of carrying out the objects of its incorporation, entered into a certain lease whereby it leased for a term of twenty-five years all of the property so acquired from the Emery,

Bird, Thayer Dry Goods Company by the aforementioned warranty deed, at an annual rental of one hundred and eight thousand dollars per year, payable quarterly, said lease being attached to the petition herein, marked "Exhibit C"; that the plaintiff has managed, controlled, and operated said property under the terms and provisions of said lease, and has enjoyed the profits therefrom from time to time, and at the expiration of said lease said property, and all of it, is to be redelivered to said plaintiff by the lessee thereof, and said plaintiff will then and thereby have and exercise the control and management of said property in such manner and under such terms as it may deem proper within the limits of the powers and authority granted it under the terms of its incorporation. That among other provisions of said lease it is provided as follows: "In case of the destruction of said building by fire or otherwise, said party of the first part (The Emery, Bird, Thayer Realty Company) agrees to rebuild said buildings in substantially as good condition as
75 they are at present with such changes, alterations, and modifications as may be agreed upon between the parties hereto, with all reasonable dispatch and diligence." And it is further provided that "should said party of the second part fail, neglect, or refuse to pay the rental herein reserved for a period of fifteen days after the same shall become due and payable, or fail, neglect, or refuse to keep and perform the other obligations contained in this lease, then in that event said party of the first part shall have the right and privilege to enter upon and take possession of said premises, but for this cause the obligation to pay rent shall not cease." And it is further provided in said lease that "and the said party of the second part does further promise and agree to keep said premises in good repair during the entire term of this lease and to keep the same free from all nuisances and to return the same to the party of the first part at the termination of this lease in as good condition as they are at present, ordinary wear and tear and the acts of Providence excepted."

7. That C. G. Burton, the collector of internal revenue of the United States for the sixth district of Missouri, under the provisions of section 38 of the act of Congress entitled, "An act to provide revenue, equalize duties, and encourage industries of the United States, and for other purposes," approved on the 5th day of August, 1909, assessed and collected and caused to be collected taxes for the years 1909 and 1910 the sum of one thousand and thirty dollars for each year, a total of two thousand and sixty dollars.

8. That said tax of one thousand and thirty dollars for each of said years was the legal and lawful tax of one per centum upon the income of said corporation, the Emery, Bird, Thayer Realty Company, of one hundred and eight thousand dollars, less five thousand dollars, as provided for in said above-mentioned act.

9. That said tax of one thousand and thirty dollars for each
76 of the years 1909 and 1910 is an excise tax provided for in said act upon the carrying on and doing of business in a cor-

porate capacity by the said Emery, Bird, Thayer Realty Company; that said tax was paid under protest, and an application was made to the honorable Commissioner of Internal Revenue for a refund of said amount so collected by the collector of internal revenue of the United States for the sixth district of Missouri, and that said Commissioner of Internal Revenue decided said application for refund against the said plaintiff, The Emery, Bird, Thayer Realty Company, and refused to return or refund said taxes so collected, or any part thereof.

10. That the plaintiff, the Emery, Bird, Thayer Realty Company, was at all the times during the years 1909 and 1910, and is now, a corporation organized under the laws of the State of Missouri for profit, and is doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress, and did, at all the times during said years, act in its corporate capacity in holding, managing, controlling, operating, collecting and enjoying the rents and profits from the real estate, leasehold interests, and property acquired by it as hereinabove set forth on February 1st, 1908, and that, as such corporation, it has during all of said times enjoyed all of the rights, powers, privileges, and immunities pertaining and incident to corporations organized under the provisions of the laws relative to the organization of corporations in the State of Missouri, and that as such corporation so organized as aforesaid, it is authorized to manage, rent, control, and operate the property aforesaid, and to collect the rents and profits derived therefrom.

77 11. That this suit is brought under the provisions of chapter 2, section 24, paragraph 20, of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, 36 Statutes at Large, page 1087, and the provisions of section 2 of the act of Congress approved March 3, 1887, chapter 359, 24 Statutes at Large, page 505, commonly called the Tucker Act; that this suit is brought by the plaintiff against the United States of America and not against the collector of internal revenue.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, defendant prays the court to adjudge and declare as follows:

1. That this court has no jurisdiction of the subject matter of this suit.

2. That plaintiff can not maintain this suit against the United States of America.

3. That this suit is against the wrong party.

4. That the cause of action, if any, set forth in plaintiff's petition arises out of the administration of the internal-revenue laws of the United States, and this court is without jurisdiction to consider the subject matter thereof.

5. That the Emery, Bird, Thayer Realty Company was at all times during the years 1909, 1910, and 1911, and is now, a corporation required by the said act of Congress to make return of its income under said act of Congress, and particularly under the provisions of section 38 thereof, and is liable to be assessed and compelled to pay a tax of one per cent upon the income of said corporation less five thousand dollars, as provided for in said Act, for the years 1909 and 1910, and each of them.

6. That the plaintiff was during the years 1909, 1910, and 1911, and each of them, and is now doing business in its corporate capacity for profit, and is now, and has at all said times, enjoyed the rights, powers, privileges, and immunities granted to cor-
78 porations organized under the laws of this State relative to the organization of corporations, and is authorized and has been doing business within the powers granted to it in a corporate capacity within the true intent and meaning of section 38 of said act of Congress approved August 5, 1909.

7. That said taxes for the years 1909 and 1910, and each of them, were legally assessed against and levied upon plaintiff, and that plaintiff is not entitled to recover the sum so collected as aforesaid from the defendant, the United States of America.

8. That the judgment should be in favor of the defendant and against the plaintiff, and that the defendant shall have judgment for its costs in this behalf incurred and expended.

Respectfully submitted.

LESLIE J. LYONS,
United States Attorney.

Afterwards, to wit, on the 17th day of July, A. D. 1912, defendant's request for modified findings of fact was filed. Said request for modified findings of fact is in words and figures as follows:

79 In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, plaintiff, *vs.* UNITED STATES OF AMERICA, DEFENDANT.	No. 3821.

Defendant's request for modified findings of fact.

Now comes the defendant, with leave of court first had and obtained, and files this request for modification of the request for findings of fact and conclusions of law heretofore filed in the above-entitled cause, in this, to wit, that the defendant requests the court to find in lieu of request No. 11 on page 6 of defendant's requests for findings of fact, the following:

That this suit is brought under the provisions of the act of Congress approved March 3, 1887, chapted 359, 24 Statutes at Large, page 505, commonly called the Tucker Act, as amended by the provisions of chapter 2, section 24, paragraph 20, and chapter 14, section 297, paragraph 7, of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, 36 Statutes at Large, page 1087; that this suit is brought by the plaintiff against the United States of America and not against the collector of internal revenue.

Respectfully submitted.

LESLIE J. LYONS,
United States Attorney.

80 Afterwards, to wit, on the 27th day of July, A. D. 1912, the same being a day of the regular April term of said court, the following entry appears of record:

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION,
vs.
THE UNITED STATES OF AMERICA. } 3821.

This cause coming on for hearing this 27th day of July, 1912, comes the plaintiff by its attorneys, Smart and Strother, comes also the defendant by the honorable United States district attorney, Leslie J. Lyons, and the court being fully advised in the premises, files herewith his written findings of fact, conclusions of law, and opinion. Which said findings of fact and conclusions of law are as follows, to wit:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, plaintiff,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 3821.

Messrs. Smart & Strother, of Kansas City, Missouri, solicitors for plaintiff.

Mr. Leslie J. Lyons, United States attorney, of Kansas City, Missouri, solicitor for defendant.

This is a suit by plaintiff against the United States under the act of Congress approved March 3rd, 1887, commonly known as the "Tucker Act," to recover certain sums paid by plaintiff, under protest, to C. G. Burton, collector of the sixth internal revenue collection district of Missouri, at Kansas City, assessed under the corporations special excise tax law, approved August 5th,
81 1909. The defendant contests the suit upon the grounds: First, because the cause of action arises out of the administration

of the internal revenue laws of the United States, and this Court is without jurisdiction to consider the subject-matter thereof; that plaintiff has brought this suit against the wrong party, and should have brought it against the collector of internal revenue for the sixth district of Missouri. Second, because, in any event, the plaintiff is a corporation organized for profit, and is doing business in the corporate capacity within the true intent and meaning of the act of August 5th, 1909, and hence is liable for the tax assessed and collected.

The specific findings of fact and conclusions of law required by statute to be set forth are as follows:

FINDINGS OF FACT.

Plaintiff is a corporation organized on the 14th day of January, 1908, under the laws of the State of Missouri in such cases made and provided, and having its principal office and place of business and residence at Kansas City, in the county of Jackson, and State of Missouri, in the Western Division of the Western District of Missouri.

The purposes for which plaintiff was organized, as set forth in its articles of association are as follows, to wit:

"Seventh: That the purposes for which this corporation is formed are the following, to wit:

"1. To acquire and hold the title to lots 'H,' 'I,' 'J,' and 'K' in block twenty-three (23) in McGee's addition to the city of Kansas (now Kansas City) Missouri, and to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following described real estate situate in Kansas City, Missouri, to wit:

82 "The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas (now Kansas City); also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78) in said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street. Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78), running thence north on a line parallel to the west line of Grand Avenue in said city one hundred and twenty-eight (128) feet to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet more or less to the east line of said lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut Street in said city one hundred twenty-eight (128) feet more or less to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet more or less to the place of beginning. Said last-mentioned strip of land having formerly been the south one hundred twenty-eight (128) feet of the alley running north and south through the block in said Swope's addition, bounded on the north by Tenth

Street, on the east by Grand Avenue, on the south by Eleventh Street, and on the west by Walnut Street, said portion of said alley comprised in the boundaries of said strip aforesaid having been by the order and decree of the County Court of said Jackson County, made and entered May 6th, 1889, vacated as such. Said leasehold interest being the unexpired term of a lease of said last-described premises from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Lawrence Minot, trustees of the Boston Ground Rent Trust, to The Merchants Building Association, a corporation, said lease being dated the 11th day of April,
83 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds of Jackson County, at Kansas City, Missouri, in Book B 423 at pages 184 and following, together with all the buildings and improvements situated upon all of said real estate and constituting a part thereof. And also to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following-described real estate situated in Kansas City, Jackson County, Missouri, to wit: Lot numbered seventy-five (75) in Swope's addition to the city of Kansas (now Kansas City), Missouri. Said leasehold interest being the unexpired term of a lease of said last-described premises from Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company dated the first day of March, 1905, and recorded on the 4th day of March, 1905, in said office of the recorder of deeds of said Jackson County, Missouri, at Kansas City, in Book B 961 at page 22, as amended by an agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1107 at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1154 at page 66. And also to acquire and hold the leasehold interest of said Emery, Bird, Thayer Dry Goods Company in said last-described real estate under and by virtue of a certain other lease thereof to it from said Mary S. Dickerson dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1108 at page 450.

"2. To carry out and perform all the terms, provisions, covenants, and agreements contained in said leases mentioned in paragraph '1' aforesaid, to be kept, carried out, and performed by the lessee and its successors and assigns, and for this purpose to make such
84 contracts, to do such acts and incur such indebtedness as may be necessary and proper therefor, to enforce the performance of all the terms, provisions, covenants, and agreements of said leases to be kept, carried out, and performed by the lessors therein and their successors and assigns, and for this purpose to make such con-

tracts, to do such acts, and institute and prosecute such suits as may be necessary an proper therefor.

"3. To lease the property described in paragraph '1' aforesaid, and every part thereof to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms and for such rental as may be, from time to time, mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rentals as will produce for the benefit of the stockholders of this corporation a net dividend upon the entire capital stock of this corporation of at least six per cent per annum, free and clear of all costs, charges, and expenses of every kind whatsoever.

"4. To sell, assign, transfer, and convey the property described in paragraph '1' as aforesaid, and every and any part thereof, at such times, to such persons, and on such terms, and at such prices as may be, from time to time, determined by an affirmative vote of not less than two-thirds of the entire capital stock of this corporation, cast at a stockholders' meeting legally held."

At the time of the organization and incorporation of plaintiff, as aforesaid, a certain other corporation, to wit, Emery, Bird, Thayer Dry Goods Company, was the owner of and in possession of the real estate, leasehold interests, buildings, and improvements, and all the property described in said articles of association of plaintiff and set out as aforesaid.

Said Emery, Bird, Thayer Dry Goods Company was, and still is, a corporation organized under the laws of the State of Missouri, and having its office and principal place of business at said Kansas City, Missouri, and engaged in the business of buying and selling goods, wares, and merchandise in its department store in said Kansas City, and at the time of the incorporation of plaintiff, was using and occupying said property for the purposes of its said business.

85 On the first day of February, 1908, said Emery, Bird, Thayer Dry Goods Company, in consideration of the sum of one dollar ($1.00) and other valuable considerations to it paid by plaintiff herein, granted, bargained and sold, conveyed and confirmed unto the plaintiff herein all its said property, real estate, buildings, and improvements above described, by a warranty deed, a copy of which is annexed to and filed with the plaintiff's petition and marked "Exhibit B."

After the execution of said warranty deed and conveyance to plaintiff of said property by said Emery, Bird, Thayer Dry Goods Company, as aforesaid, and on, to wit, the first day of February, 1908, plaintiff demised and let all of said property, real estate, and improvements unto said Emery, Bird, Thayer Dry Goods Company for a term of twenty-five (25) years, beginning on the first day of January, 1908, and ending on the first day of January, 1933, at and for the annual rental of one hundred eight thousand ($108,000.00) dollars, payable in equal quarterly installments on or before the first days of January, April, July, and October of each and every year of said term and for the further consideration of the promise and

agreement of said Emery, Bird, Thayer Dry Goods Company to pay all the taxes on all of said premises during the continuation of said lease; also to keep all the buildings on said premises fully insured in good and solvent insurance companies for the use and benefit of the plaintiff and in its name, and also to pay all the rentals and charges falling due on leasehold premises aforesaid, and to keep and perform all the obligations and conditions contained in said original leases of said premises to be kept and performed by the lessee therein and to save harmless plaintiff from all rentals, charges, and obligations of said original leases, a copy of which lease is annexed to and filed with plaintiff's petition and marked " Exhibit C."

86 Upon the execution of said lease, said Emery, Bird, Thayer Dry Goods Company in pursuance thereof and thereunder entered into the possession of all of said premises, so leased to it by plaintiff and continuously since that time, hitherto has been and still is in exclusive possession thereof, performing all the terms and obligations of said lease.

Said leasehold interest under said lease from John Quincy Adams et al., trustees of the Boston Ground Rent Trust to the Merchants Building Association, mentioned in said articles of association of plaintiff, was and is the unexpired portion of the term of ninety-nine (99) years, beginning on the first day of April, 1890, as set forth in said lease, a copy of which is annexed to and filed with plaintiff's petition and marked " Exhibit D."

Said leasehold interest, under said lease from Mary S. Dickerson, dated March 1, 1905, mentioned in said articles of association and under the agreements of modification and extension thereof, mentioned therein, was and is the unexpired portion of the term of fifteen (15) years expiring on the first day of March, 1920, as appears from copies of said lease, agrement of modification, and agreement of extension thereof, attached to and filed with plaintiff's petition and marked, respectively, " Exhibit E, F, and G."

Said leasehold under the lease of said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, mentioned in said articles of association under a lease dated the 7th day of October, 1907, is for a term of sixty-nine (69) years, beginning on the first day of March, 1920, and expiring on the first day of March, 1989, as appears from a copy of said lease, annexed to and filed with plaintiff's petition and marked " Exhibit E."

On the 26th day of February, 1910, one C. G. Burton, the collector of United States internal revenue for the sixth district of the

87 State of Missouri, claiming to act under section 38 of the act of Congress entitled " An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved on the 5th day of August, 1909, and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1909, under the penalties in said act provided for its failure therein so to do, required plaintiff to make the return as required by said act and in the form provided therefor.

Plaintiff did on said 26th day of February, 1910, under protest, make such return showing its total income for the year 1909 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of one hundred eight thousand ($108,000) dollars, as aforesaid.

By the terms of said protest, plaintiff claimed that it was under no legal obligation whatever to make such return or any return whatever of its net annual income for the year 1909 or to furnish any of the information called for in such return; plaintiff further claimed in said protest that its entire income was derived solely from the rents of land and real estate belonging to it and that for that specific reason, in addition to other reasons, it was not required to make any return of its said income, and in said protest; plaintiff further claimed that said section 38 of said act of Congress was unconstitutional and void and that its return was made under protest and solely for the purpose of avoiding the penalties or attempted enforcement of the penalties mentioned in said act. A copy of said protest is attached to and filed with plaintiff's petition and marked "Exhibit I."

The only income of plaintiff for the year 1909 was said sum of one hundred eight thousand ($108,000), paid to it by said Emery, Bird, Thayer Dry Goods Company as rental of the property above described, in accordance with the terms of said lease from it to said dry goods company.

88 On the 6th day of May, 1910, said C. G. Burton, collector as aforesaid, served upon the plaintiff notice of and demand for taxes assessed against it on its said income, a copy of which notice and demand is annexed to and filed with plaintiff's petition and marked "Exhibit J."

By said notice and demand, said collector notified plaintiff that it had been assessed upon its said return for the year 1909 a tax under said act of Congress in the sum of one thousand thirty ($1,030.00) dollars, and that said tax would become due and payable on or before the 30th day of June, 1910, and that unless the same were paid it would become his duty to collect the same with a penalty of five per centum additional and interest at the rate of one per centum per month.

On the 28th day of June, 1910, plaintiff paid to said collector the sum of one thousand thirty ($1,030.00) dollars in payment of said tax and paid the same under protest and unwillingly and because of requirement and demand of said collector aforesaid, and to prevent proceedings to compel the payment thereof, together with interest and penalties, as set forth in said demand of said collector made on said 6th day of May, 1910, as aforesaid; and at the time of said payment notified said collector that it intended to sue for the money thereby paid; that said protest was in writing and a copy thereof is annexed to and filed with the petition of plaintiff and marked "Exhibit K."

On the 21st day of February, 1911, said C. G. Burton, collector as aforesaid, claiming to act under said section 38 of said act of

Congress, and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1910 under the penalties therein provided for its failure therein so to do, required plaintiff to make a return, as required by said act and in the form provided therefor.

89 On the 21st day of February, 1911, plaintiff did under protest make such return showing its total income for the year 1910 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of one hundred eight thousand ($108,000) dollars, as aforesaid; that by its said protest plaintiff claimed that it was under no legal obligation whatever to make such return or any return whatever of its net annual income for said year 1910 or to furnish any of the information called for in such return and further claimed that its entire income was derived solely from the rents of land and real estate belonging to it, and for that specific reason, in addition to other reasons, it was not required to make any return of its said income, and further claimed that said section of said act of Congress was unconstitutional and void, and that its said return was made unwillingly and under protest and solely for the purpose of avoiding the penalties or attempted enforcement of the penalties, mentioned in said section 38 of said act of Congress; that said protest was in writing and a copy thereof is annexed to and filed with plaintiff's petition and marked "Exhibit L."

The only income of plaintiff during said year 1910 was said sum of one hundred eight thousand ($108,000) dollars, received by it as rental from said Emery, Bird, Thayer Dry Goods Company under said lease to said dry goods company as aforesaid.

On the day of March, 1911, said C. G. Burton, collector as aforesaid, served upon plaintiff a certain notice of and demand for taxes assessed upon its said return and thereby notified plaintiff that a special excise tax under the provision of said section 38 of said act of Congress, amounting to one thousand thirty ($1,030.00) dollars had been assessed against it by the Commissioner of Internal Revenue and transmitted to him for collection, and that said tax was due and payable on or before the 30th day of June, 1911, a copy of which said notice and demand is annexed to and filed with plaintiff's petition and marked "Exhibit M."

90 On the 16th day of June, 1911, plaintiff paid to said collector said sum of one thousand thirty ($1,030.00) dollars in payment of said tax and paid the same under protest and only because of the requirement of said collector and to prevent proceedings to compel collection together with interest and penalties, as provided in said act.

At the time of said payment plaintiff delivered to said collector its written notice of protest to the effect that said payment was unwillingly made and under protest and that said tax was illegal, invalid, and improperly assessed and that said payment was made under protest and only because of the requirements of said collector and to prevent proceedings to compel the payment thereof, together with interest and penalties, and notified said collector that it intended

to sue for the money thereby paid, a copy of which said notice of protest is annexed to and filed with said plaintiff's petition and marked "Exhibit N."

After the payment of said two sums of one thousand thirty dollars each, aggregating the sum of two thousand sixty ($2,060.00) dollars, as aforesaid, to said collector of internal revenue of the United States for the sixth district of Missouri, said collector paid the same over to the United States, the defendants in this suit, who have since retained, and are now retaining, the same.

Said payments were made by plaintiff unwillingly and on compulsion and under duress for the purpose of avoiding the penalties provided by said act of Congress for a failure to pay the same and also for the purpose of preventing said collector from taking steps to collect the same, together with interest and penalties, as provided in said act of Congress, and from proceeding against plaintiff and its property and levying upon its property and to prevent the collection by said collector as he was then and there threatening to do.

91 Plaintiff was not, at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress and was not, as a matter of fact, engaged in or doing any business in said years 1909, 1910, and 1911, or any of them, and during said years did not in fact act in any corporate capacity, except to hold the usual meetings of its stockholders for the election of directors and the usual meetings of its directors for the election of its officers and for the receipt of the rentals, reserved under said lease from it to said Emery, Bird, Thayer Dry Goods Company, of the property aforesaid, to wit, said sum of one hundred eight thousand ($108,000.00) dollars yearly and the distribution of such rentals as dividends to its stockholders in accordance with its said articles of association.

On the 30th day of June, 1911, plaintiff filed with said C. G. Burton, collector as aforesaid, in the form required and provided by law and in accordance with the regulations of the Secretary of the Treasury in such cases made and provided, its claim for the refund and repayment of said taxes paid by it as aforesaid, which said claim was by said collector transmitted and submitted to the Commissioner of Internal Revenue, and thereupon and thereby plaintiff appealed to said Commissioner of Internal Revenue for a refund and repayment to it of said sum of two thousand sixty dollars, claimed by it to have been illegally and wrongfully collected from it as aforesaid.

On the day of July, 1911, said commissioner refused and rejected said claim and every part thereof and refused to refund said sum of two thousand sixty dollars, or any part thereof, to plaintiff.

92 Plaintiff's suit herein was filed on the 10th day of February, 1912, and due service thereof had upon the United States distict attorney within and for the Western District of Missouri, and

upon the Attorney General of the United States, as provided in the acts of Congress in such cases made and provided.

This suit is brought under the provisions of the act of Congress approved March 3, 1887, chapter 359, 24 Statutes at Large, page 505, commonly called the Tucker Act, as amended by the provisions of chapter 2, section 24, paragraph 20, and chapter 14, section 297, paragraph 7, of the act of Congress entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, 36 Statutes at Large, page 1'87; that this suit is brought by the plaintiff against the United States of America, and not against the collector of internal revenue.

CONCLUSIONS OF LAW.

Plaintiff was not at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation required by the said act of Congress to make return of its income under said act of Congress, and was not and is not liable to be assessed or compelled to pay said tax so assessed upon and levied against it during said years, or any of them.

Plaintiff was not, during the years 1909, 1910, and 1911, or any of them, and is not now, doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress.

Taxes for the years 1909 and 1910 were illegally assessed against and levied upon plaintiff and it is entitled to recover the same in this suit.

It is, therefore, considered, ordered, and adjudged by the court that the plaintiff have and recover of and from the defendant the said sum of two thousand sixty ($2,060.00) dollars, together with interest thereon from the date of this judgment at the rate of four (4%) per cent per annum and its costs, herein expended. To which findings of fact and each of them, and the conclusions of law and each of them, and to the ruling and judgment of the court the
93 defendant in open court duly excepted and said exceptions were by the court allowed.

Afterwards, to wit, on the 20th day of January, A. D. 1913, the following order was filed and entered of record:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

Order allowing writ of error.

This 20th day of January, 1913, comes the defendant herein by its attorney and files herein and presents to the court its petition pray-

ing for the allowance of a writ of error, and an assignment of errors intended to be urged by it, and praying also that a transcript of the record, findings of fact and conclusions of law, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, and all further proceedings in this court shall be stayed during the pendency of said cause in the Supreme Court.

(Signed) ARBA S. VAN VALKENBURGH,
Judge.

94 Said assignment of errors filed herein January 20, 1913, is in words and figures as follows:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, plaintiff,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

Assignment of errors.

The defendant in this action in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, and in the proceedings prior to the trial thereof, to wit:

First. The court erred in overruling the demurrer of the defendant to the petition of the plaintiff.

Second. The court erred in holding that it had jurisdiction of the matter in controversy.

Third. The court erred in refusing to find as requested by defendant in its eighth request for findings of fact, whether or not the said tax of one thousand and thirty dollars ($1,030) for each of said years was the legal and lawful tax of one per centum upon the income of said corporation, the Emery, Bird, Thayer Realty Company, of $108,000.00, less $5,000.00 as provided for in said above mentioned act.

Fourth. The court erred in refusing to find, as requested by defendant in its ninth request for findings of fact, whether or not the said tax of $1,030.00 for each of the years 1909 and 1910 was an excise tax provided for in said act upon the carrying on and doing of business in a corporate capacity by the said Emery, Bird,
95 Thayer Realty Company, and that said tax was paid under protest, and an application made to the honorable Commissioner of Internal Revenue for a refund of said amount so collected

by the collector of internal revenue of the United States for the sixth district of Missouri, and that said Commissioner of Internal Revenue decided said application for refund against the said plaintiff, the Emery, Bird, Thayer Realty Company, and refused to return or refund said taxes so collected, or any part thereof.

Fifth. The court erred in refusing to find, as requested by defendant in its tenth request for findings of fact, that the plaintiff, the Emery, Bird, Thayer Realty Company, was at all the times during the years 1909 and 1910, and now is a corporation organized under the laws of the State of Missouri for profit, and doing business in a corporate capacity within the true intent and meaning of section 38 of said act of Congress, and did at all the times during said years act in its corporate capacity in holding, managing, controlling, operating, collecting, and enjoying the rents and profits from the real estate leasehold interests and property acquired by it on February 1, 1908, and that as such corporation it has during all of the said times enjoyed all the rights, powers, privileges, and immunities pertaining and incident to corporations organized under the provisions of the laws relative to the organization of corporations in the State of Missouri, and that as such corporation so organized as aforesaid, it is authorized to manage, rent, control, and operate the property aforesaid, and to collect the rents and profits derived therefrom.

Sixth. The court erred in refusing to find as requested by defendant in its eleventh request for findings of fact, that the suit in question was brought under the provisions of chapter 2, section 24, paragraph 20, of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, 36 Statutes at Large, page 1087, and the provisions
96 of section 2 of the act of Congress approved March 3, 1887, chapter 359, 24 Statutes at Large, page 505, commonly called the Tucker Act, and that this suit is brought by plaintiff against the United States of America, and not against the collector of internal revenue.

Seventh. The court erred in refusing to declare the law as requested in the first conclusions of law asked by defendant.

Eighth. The court erred in refusing to declare the law as requested in the second conclusions of law asked by defendant.

Ninth. The court erred in refusing to declare the law as requested in the third conclusions of law asked by defendant.

Tenth. The court erred in refusing to declare the law as requested in the fourth conclusions of law asked by defendant.

Eleventh. The court erred in refusing to declare the law as requested in the fifth conclusions of law asked by defendant.

Twelfth. The court erred in refusing to declare the law as requested in the sixth conclusions of law asked by defendant.

Thirteenth. The court erred in refusing to declare the law as requested in the seventh conclusions of law asked by defendant.

Fourteenth. The court erred in refusing to declare the law as requested in the eighth conclusions of law asked by defendant.

Fifteenth. The court erred in finding as a fact that "plaintiff was not, at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress, and was not, as a matter of fact, engaged in or doing any business in said years 1909, 1910, and 1911, or any of them, and during said years did not, in fact, act in any corporate capacity, except to hold the usual meetings of its stockholders for the election of directors and the usual meetings of its directors for the election of its officers and for the receipt of the rentals, reserved under said lease from it to said Emery, Bird, Thayer Dry Goods Company of the property aforesaid, to wit, said sum of one hundred eight thousand ($108,000.00) dollars yearly, and the dis-
97 tribution of such rentals as dividends to its stockholders in accordance with its said articles of association."

Sixteenth. The court erred in its conclusions of law as follows: "Plaintiff was not at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation required by the said act of Congress to make return of its income under said act of Congress, and was not and is not liable to be assessed or compelled to pay said tax so assessed upon and levied against it during said years, or any of them."

Seventeenth. The court erred in its conclusions of law as follows: "Plaintiff was not during the years 1909, 1910, and 1911, or any of them, and is not now, doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress."

Eighteenth. The court erred in its conclusions of law as follows: "Taxes for the years 1909 and 1910 were illegally assessed against and levied upon plaintiff, and it is entitled to recover the same in this suit."

Nineteenth. The court erred in holding that the plaintiff herein was entitled to recover of and from defendant the sum of two thousand and sixty dollars, with interest at the rate of four per centum per annum, and the costs of the action, and in rendering judgment in favor of plaintiff herein and against defendant for said sum of two thousand and sixty dollars, with interest at the rate of four per centum per annum, and the costs of said action, whereas by the law the judgment ought to have been given for the defendant United States, and against the plaintiff, The Emery, Bird, Thayer Realty Company.

Wherefore, the defendant United States of America prays the judgment aforesaid may be reversed, annulled, and altogether held for naught.

LESLIE J. LYONS,
Attorney for Defendant.

98 The petition for writ of error filed herein on the 20th day of January, 1913, is in words and figures as follows:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, plaintiff,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

Petition for writ of error.

And now comes the United States of America, defendant herein, and says:

That on or about the twenty-seventh day of July, 1912, the District Court of the United States for the Western Division of the Western District of Missouri, aforesaid, entered a judgment herein in favor of the plaintiff, and against the defendant, in which judgment, findings of fact, conclusions of law, opinion and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

LESLIE J. LYONS,
United States District Attorney and Attorney for Defendant.

99 Afterwards, to wit, on the 22nd day of January, 1913, a præcipe for transcript was filed. Said præcipe is in words and figures as follows:

KANSAS CITY, MISSOURI, *January 21, 1913.*

Hon. JOHN B. WARNER,
Clerk U. S. District Court, Kansas City, Missouri.

DEAR SIR: In the case of Emery, Bird, Thayer Realty Company vs. United States, in which a writ of error was sued out on yesterday, you will kindly prepare the record for the Supreme Court. This record should contain the petition, affidavit of service, demurrer, order of court upon demurrer, answer, reply, motions, demurrer at the close of all the evidence and order of court thereon, defendant's requests for findings of fact, defendant's requests for modified findings of fact, findings of fact, conclusions of law, opinion and judgment of the court, and all orders made by the court in the cause.

Yours, truly,

LESLIE J. LYONS,
United States Attorney.

We hereby acknowledge service of the above præcipe this 22nd day of January, 1913.

ALBERT R. STROTHER and
JAMES G. SMART,
Attorneys for Emery, Bird, Thayer Realty Company.

100 The findings of fact, conclusions of law, and opinion filed herein on the 27th day of July, A. D. 1912, are in words and figures as follows:

In the District Court of the United States for the Western Division of the Western District of Missouri.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, plaintiff,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 3821.

Messrs. Smart & Strother, of Kansas City, Missouri, solicitors for plaintiff.

Mr. Leslie J. Lyons, United States attorney, of Kansas City, Missouri, solicitor for defendant.

This is a suit by plaintiff against the United States under the act of Congress approved March 3rd, 1887, commonly known as the "Tucker Act," to recover certain sums paid by plaintiff, under protest, to C. G. Burton, collector of the sixth internal-revenue collection district of Missouri, at Kansas City, assessed under the corporations special excise tax law, approved August 5th, 1909. The defendant contests the suit upon the grounds, first, because the cause of action arises out of the administration of the internal revenue laws of the United States, and this court is without jurisdiction to consider the subject matter thereof; that plaintiff has brought this suit against the wrong party, and should have brought it against the collector of internal revenue for the sixth district of Missouri. Second, because, in any event, the plaintiff is a corporation organized for profit, and is doing business in the corporate capacity within the true intent and meaning of the act of August 5th, 1909, and hence is liable for the tax assessed and collected.

The specific findings of fact and conclusions of law required by statute to be set forth are as follows:

101 *Findings of fact.*

Plaintiff is a corporation organized on the 14th day of January, 1908, under the laws of the State of Missouri in such cases made and provided, and having its principal office and place of business and residence at Kansas City, in the county of Jackson and State of

Missouri, in the Western Division of the Western District of Missouri.

The purposes for which plaintiff was organized, as set forth in its articles of association, are as follows, to wit:

"Seventh. That the purposes for which this corporation is formed are the following, to wit:

"1. To acquire and hold the title to lots 'H,' 'I,' 'J,' and 'K' in block twenty-three (23) in McGee's addition to the city of Kansas (now Kansas City), Missouri, and to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following-described real estate situate in Kansas City, Missouri, to wit:

"The south thirty-two (32) feet of lot numbered forty-nine (49) in Swope's addition to the city of Kansas (now Kansas City); also all of lots numbered forty-eight (48), forty-seven (47), seventy-six (76), seventy-seven (77), and seventy-eight (78) in said addition, except that portion of said lots forty-seven (47), forty-eight (48), and forty-nine (49) heretofore condemned for the purpose of widening Walnut Street. Also a strip of land described as follows: Beginning at the southwest corner of said lot numbered seventy-eight (78); running thence north on a line parallel to the west line of Grand Avenue, in said city, one hundred and twenty-eight (128) feet, to a point in the west line of said lot numbered seventy-six (76); thence west sixteen and one-half (16½) feet, more or less, to the east line of said lot numbered forty-nine (49); thence south on a line parallel to the east line of Walnut Street, in said city, one hundred twenty-eight (128) feet, more or less, to the southeast corner of said lot numbered forty-seven (47); thence east sixteen and one-half (16½) feet, more or less, to the place of beginning. Said last-mentioned strip of land having formerly been the south one hundred twenty-eight (128) feet of the alley running north and south through the block in said Swope's addition, bounded on the north by Tenth Street, on the east by Grand Avenue, on the south by Eleventh Street, and on the west by Walnut Street, said portion of said alley comprised in the boundaries of said strip aforesaid having been by the order and decree of the County Court of said Jackson County, made and entered May 6th, 1889, vacated as such. Said leasehold interest being the unexpired term of a lease of said last-described premises from John Quincy Adams, Moses Williams, Charles E. Cotting, William Minot, jr., and Lawrence Minot, trustees of the Boston Ground Rent Trust to the Merchants' Building Association, a corporation, said lease being dated the 11th day of April, 1890, and recorded on the 22nd day of April, 1890, in the office of the recorder of deeds of Jackson County, at Kansas City, Missouri, in Book B 423, at pages 184 and following, together with all the buildings and improvements situated upon all of said real estate and constituting a part thereof. And also to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company in the following described real estate situated in Kansas City, Jackson County, Missouri, to wit: Lot numbered seventy-five (75) in Swope's addition to the city

of Kansas (now Kansas City), Missouri. Said leasehold
102 interest being the unexpired term of a lease of said last described premises from Mary S. Dickerson to said Emery, Bird, Thayer Dry Goods Company, dated the first day of March, 1905, and recorded on the 4th day of March, 1905, in said office of the recorder of deeds of said Jackson County, Missouri, at Kansas City, in Book B 961, at page 22, as amended by an agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 14th day of March, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1107, at page 301, and as again amended and extended by another agreement between said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, dated the 10th day of April, 1905, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1154, at page 66. And also to acquire and hold the leasehold interest of said Emery, Bird, Thayer Dry Goods Company in said last described real estate under and by virtue of a certain other lease thereof to it from said Mary S. Dickerson, dated the 7th day of October, 1907, and recorded in said office of said recorder of deeds on the 9th day of January, 1908, in Book B 1108, at page 450.

"2. To carry out and perform all the terms, provisions, covenants, and agreements contained in said leases mentioned in paragraph '1' aforesaid to be kept, carried out, and performed by the lessee and its successors and assigns, and for this purpose to make such contracts, to do such acts, and incur such indebtedness as may be necessary and proper therefor; to enforce the performance of all the terms, provisions, covenants, and agreements of said leases to be kept, carried out, and performed by the lessors therein and their successors and assigns, and for this purpose to make such contracts, to do such acts, and institute and prosecute such suits as may be necessary and proper therefor.

"3. To lease the property described in paragraph '1' aforesaid, and every part thereof, to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms, and for such rental as may be from time to time mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rentals as will produce for the benefit of the stockholders of this corporation a net dividend upon the entire capital stock of this corporation of at least six per cent per annum free and clear of all costs, charges, and expenses of every kind whatsoever.

"4. To sell, assign, transfer, and convey the property described in paragraph '1' as aforesaid, and every and any part thereof, at such times, to such persons, and on such terms and at such prices as may be from time to time determined by an affirmative vote of not less than two-thirds of the entire capital stock of this corporation cast at a stockholders' meeting legally held."

At the time of the organization and incorporation of plaintiff as aforesaid a certain other corporation, to wit, Emery, Bird, Thayer Dry Goods Company, was the owner of and in possession of the real

estate, leasehold interests, buildings and improvements, and all the property described in said articles of association of plaintiff and set out as aforesaid.

Said Emery, Bird, Thayer Dry Goods Company was and still is a corporation organized under the laws of the State of Mis-
103 souri, and having its office and principal place of business at said Kansas City, Missouri, and engaged in the business of buying and selling goods, wares, and merchandise in its department store in said Kansas City, and at the time of the incorporation of plaintiff was using and occupying said property for the purposes of its said business.

On the first day of February, 1908, said Emery, Bird, Thayer Dry Goods Company, in consideration of the sum of one dollar ($1.00) and other valuable considerations to it paid by plaintiff herein, granted, bargained, and sold, conveyed, and confirmed unto the plaintiff herein all its said property, real estate, buildings, and improvements above described by a warranty deed, a copy of which is annexed to and filed with the plaintiff's petition and marked "Exhibit B."

After the execution of said warranty deed and conveyance to plaintiff of said property by said Emery, Bird, Thayer Dry Goods Company as aforesaid, and on, to wit, the first day of February, 1908, plaintiff demised and let all of said property, real estate, and improvements unto said Emery, Bird, Thayer Dry Goods Company for a term of twenty-five (25) years, beginning on the first day of January, 1908, and ending on the first day of January, 1933, at and for the annual rental of one hundred eight thousand ($108,000.00) dollars, payable in equal quarterly installments on or before the first days of January, April, July, and October of each and every year of said term, and for the further consideration of the promise and agreement of said Emery, Bird, Thayer Dry Goods Company to pay all the taxes on all of said premises during the continuation of said lease, also to keep all the buildings on said premises fully insured in good and solvent insurance companies for the use and benefit of the plaintiff and in its name, and also to pay all the rentals and charges falling due on leasehold premises aforesaid, and to keep and perform all the obligations and conditions contained in said original leases of said premises to be kept and performed by
104 the lessee therein, and to save harmless plaintiff from all rentals, charges, and obligations of said original leases, a copy of which lease is annexed to and filed with plaintiff's petition and marked "Exhibit C."

Upon the execution of said lease said Emery, Bird, Thayer Dry Goods Company, in pursuance thereof and thereunder, entered into the possession of all of said premises, so leased to it by plaintiff and continuously since that time, hitherto has been and still is in exclusive possession thereof, performing all the terms and obligations of said lease.

Said leasehold interest under said lease from John Quincy Adams et al., trustees of the Boston Ground Rent Trust to The Merchants Building Association, mentioned in said articles of association of plaintiff, was and is the unexpired portion of the term of ninety-nine (99) years, beginning on the first day of April, 1890, as set forth in said lease, a copy of which is annexed to and filed with plaintiff's petition and marked "Exhibit D."

Said leasehold interest, under said lease from Mary S. Dickerson, dated March 1, 1905, mentioned in said articles of association and under the agreements of modification and extension thereof, mentioned therein, was and is the unexpired portion of the term of fifteen (15) years expiring on the first day of March, 1920, as appears from copies of said lease, agreement of modification, and agreement of extension thereof, attached to and filed with plaintiff's petition and marked, respectively, "Exhibit E, F, and G."

Said leasehold under the lease of said Mary S. Dickerson and said Emery, Bird, Thayer Dry Goods Company, mentioned in said articles of association under a lease dated the 7th day of October, 1907, is for a term of sixty-nine (69) years, beginning on the first day of March, 1920, and expiring on the first day of March, 1989, as appears from a copy of said lease, annexed to and filed with plaintiff's petition and marked "Exhibit E."

105 On the 26th day of February, 1910, one C. G. Burton, the collector of United States internal revenue for the sixth district of the State of Missouri, claiming to act under section 38 of the act of Congress entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes," approved on the 5th day of August, 1909, and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1909, under the penalties in said act provided for its failure therein so to do, required plaintiff to make the return as required by said act and in the form provided therefor.

Plaintiff did on said 26th day of February, 1910, under protest, make such return, showing its total income for the year 1909 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of one hundred eight thousand ($108,000) dollars, as aforesaid.

By the terms of said protest plaintiff claimed that it was under no legal obligation whatever to make such return or any return whatever of its net annual income for the year 1909 or to furnish any of the information called for in such return; plaintiff further claimed in said protest that its entire income was derived solely from the rents of land and real estate belonging to it, and that for that specific reason, in addition to other reasons, it was not required to make any return of its said income, and in said protest plaintiff further claimed that said section 38 of said act of Congress was unconstitutional and void, and that its return was made under protest and solely for the purpose of avoiding the penalties, or attempted enforcement of the penalties, mentioned in said act. A

copy of said protest is attached to and filed with plaintiff's petition and marked " Exhibit I."

The only income of plaintiff for the year 1909 was said sum of one hundred eight thousand ($108,000), paid to it by said Emery, Bird, Thayer Dry Goods Company as rental of the property above described, in accordance with the terms of said lease from it to said dry goods company.

106 On the 6th day of May, 1910, said C. G. Burton, collector as aforesaid, served upon the plaintiff notice of and demand for taxes assessed against it on its said income, a copy of which notice and demand is annexed to and filed with plaintiff's petition and marked " Exhibit J."

By said notice and demand, said collector notified plaintiff that it had been assessed upon its said return for the year 1909, a tax under said act of Congress in the sum of one thousand thirty ($1,030.00) dollars, and that said tax would become due and payable on or before the 30th day of June, 1910, and that unless the same were paid it would become his duty to collect the same with a penalty of five per centum additional and interest at the rate of one per centum per month.

On the 28th day of June, 1910, plaintiff paid to said collector the sum of one thousand thirty ($1,030.00) dollars in payment of said tax and paid the same under protest and unwillingly and because of requirement and demand of said collector aforesaid, and to prevent proceedings to compel the payment thereof, together with interest and penalties, as set forth in said demand of said collector made on said 6th day of May, 1910, as aforesaid; and at the time of said payment notified said collector that it intended to sue for the money thereby paid; that said protest was in writing and a copy thereof is annexed to and filed with the petition of plaintiff and marked " Exhibit K."

On the 21st day of February, 1911, said C. G. Burton, collector as aforesaid, claiming to act under said section 38 of said act of Congress and claiming that plaintiff was required under the terms of said act to make return of its income for the year 1910 under the penalties therein provided for its failure therein so to do, required plaintiff to make a return, as required by said act and in the form provided therefor.

On the 21st day of February, 1911, plaintiff did under protest make such return showing its total income for the year 1910

107 under said lease from it to said Emery, Bird, Thayer Dry Goods Company in the sum of one hundred eight thousand ($108,000) dollars, as aforesaid; that by its said protest plaintiff claimed that it was under no legal obligation whatever to make such return or any return whatever of its net annual income for said year 1910 or to furnish any of the information called for in such return and further claimed that its entire income was derived solely from the rents of land and real estate belonging to it and for that specific reason, in addition to other reasons, it was not required to make any

return of its said income and further claimed that said section of said act of Congress was unconstitutional and void and that its said return was made unwillingly and under protest and solely for the purpose of avoiding the penalties or attempted enforcement of the penalties, mentioned in said section 38 of said act of Congress; that said protest was in writing and a copy thereof is annexed to and filed with plaintiff's petition and marked "Exhibit L."

The only income of plaintiff during said year 1910 was said sum of one hundred eight thousand ($108,000) dollars, received by it as rental from said Emery, Bird, Thayer Dry Goods Company under said lease to said dry goods company as aforesaid.

On the . day of March, 1911, said C. G. Burton, collector as aforesaid, served upon plaintiff a certain notice of and demand for taxes assessed upon its said return and thereby notified plaintiff that a special excise tax under the provision of said section 38 of said act of Congress, amounting to one thousand thirty ($1,030.00) dollars had been assessed against it by the Commissioner of Internal Revenue and transmitted to him for collection and that said tax was due and payable on or before the 30th day of June, 1911, a copy of which said notice and demand is annexed to and filed with plaintiff's petition and marked "Exhibit M."

108 On the 16th day of June, 1911, plaintiff paid to said collector said sum of one thousand thirty ($1,030.00) dollars in payment of said tax and paid the same under protest, and only because of the requirement of said collector and to prevent proceedings to compel collection together with interest and penalties as provided in said act.

At the time of said payment, plaintiff delivered to said collector its written notice of protest, to the effect that said payment was unwillingly made and under protest and that said tax was illegal, invalid, and improperly assessed, and that said payment was made under protest and only because of the requirements of said collector and to prevent proceedings to compel the payment thereof, together with interest and penalties, and notified said collector that it intended to sue for the money thereby paid, a copy of which said notice of protest is annexed to and filed with said plaintiff's petition and marked "Exhibit N."

After the payment of said two sums of one thousand thirty dollars each, aggregating the sum of two thousand sixty (2,060.00) dollars as aforesaid, to said collector of internal revenue of the United States for the sixth district of Missouri, said collector paid the same over to the United States, the defendants in this suit, who have since retained and are now retaining the same.

Said payments were made by plaintiff unwillingly and on compulsion and under duress for the purpose of avoiding the penalties provided by said act of Congress for a failure to pay the same and also for the purpose of preventing said collector from taking steps to collect the same, together with interest and penalties, as provided in said act of Congress and from proceeding against plaintiff and its

property and levying upon its property and to prevent the collection by said collector as he was then and there threatening to do.

109 Plaintiff was not, at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress and was not, as a matter of fact, engaged in or doing any business in said years 1909, 1910, and 1911, or any of them, and during said years did not in fact, act in any corporate capacity, except to hold the usual meetings of its stockholders for the election of directors and the usual meetings of its directors for the election of its officers and for the receipt of the rentals, reserved under said lease from it to said Emery, Bird, Thayer Dry Goods Company, of the property aforesaid, to wit, said sum of one hundred eight thousand ($108,000.00) dollars yearly and the distribution of such rentals as dividends to its stockholders, in accordance with its said articles of association.

On the 30th day of June, 1911, plaintiff filed with said C. G. Burton, collector as aforesaid, in the form required and provided by law and in accordance with the regulations of the Secretary of the Treasury in such cases made and provided, its claim for the refund and repayment of said taxes paid by it as aforesaid, which said claim was by said collector transmitted and submitted to the Commissioner of Internal Revenue, and thereupon and thereby plaintiff appealed to said Commissioner of Internal Revenue for a refund and repayment to it of said sum of two thousand sixty dollars, claimed by it to have been illegally and wrongfully collected from it as aforesaid.

On the day of July, 1911, said commissioner refused and rejected said claim and every part thereof and refused to refund said sum of two thousand sixty dollars, or any part thereof, to plaintiff.

110 Plaintiff's suit herein was filed on the 10th day of February, 1912, and due service thereof had upon the United States district attorney within and for the western district of Missouri, and upon the Attorney General of the United States, as provided in the acts of Congress in such cases made and provided.

This suit is brought under the provisions of the act of Congress approved March 3, 1887, chapter 359, 24 Statutes at Large, page 505, commonly called the Tucker Act, as amended by the provisions of chapter 2, section 24, paragraph 20, and chapter 14, section 297, paragraph 7 of the act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, 36 Statutes at Large, page 1'87; that this suit is brought by the plaintiff against the United States of America, and not against the collector of internal revenue.

Conclusions of law.

Plaintiff was not at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation required by the said

act of Congress to make return of its income under said act of Congress, and was not and is not liable to be assessed or compelled to pay said tax so assessed upon and levied against it during said years, or any of them.

Plaintiff was not, during the years 1909, 1910, and 1911, or any of them, and is not now, doing business in a corporate capacity within the true intent and meaning of said section 38 of said act of Congress.

Taxes for the years 1909 and 1910 were illegally assessed against and levied upon plaintiff, and it is entitled to recover the same in this suit.

111 VAN VALKENBURGH, District Judge (after stating the case as above):

Briefly recapitulated, the questions presented are these: First, can the plaintiff bring suit to recover taxes, alleged to have been wrongfully assessed and collected under the corporation-tax law, directly against the United States under the Tucker Act, other requirements of law having been complied with, or is its remedy against the collector of internal revenue by whom the assessment and collection were made? Second, the Emery, Bird, Thayer Dry Goods Company, a business corporation of Kansas City, Missouri, originally was the owner of and was in possession of the real estate, leasehold interests, buildings, and improvements upon and in which its business was conducted. On or about February 1st, 1908, eighteen months before the passage of the corporation excise tax law, it was decided by its stockholders and officers to transfer these holdings to a corporation to be organized under the laws of the State of Missouri as the Emery, Bird, Thayer Realty Company, the plaintiff in this action. This corporation was organized for the specific purpose of holding such real estate and leasehold interests, buildings, and improvements and of leasing the same to the Emery, Bird, Thayer Dry Goods Company, and no other, for a long period, the latter company under the lease to have the entire management and assume all responsibilities respecting such properties. The stockholders of the plaintiff company were to be and are substantially identical with those of the Emery, Bird, Thayer Dry Goods Company, the only exception being members of the families of two of the officers of the Dry Goods Company. The realty company thus holding the title was to retain the single duty of collecting the rentals under this lease and pay the same as dividends to the stockholders. It also possesses under the lease
112 the general power to enforce the terms of that lease and protect its title to the property. When the lease expires, if no renewal thereof is made, it may, upon a sufficient vote of the stockholders, dispose of the properties, and presumably distribute the proceeds to the stockholders. This would amount to a liquidation of the affairs of the corporation, because no other powers to do business are granted by the charter. Under such circumstances, is it a corporation doing business within the meaning of the act of August 5th, 1909, and subject to the excise tax therein provided?

I.

The first question is no longer an open one in this jurisdiction. The precise question was before the Court of Appeals for this circuit in Christie-Street Commission Co. vs. United States, C. C. A., 136 Fed., 326. It was there held:

"A claim to recover back internal-revenue taxes illegally exacted under a misconstruction of the war revenue law of 1898, is a claim founded upon a law of Congress, within the meaning of the act of March 3, 1887, and it may be enforced by an action directly against the United States under that act, after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort."

In the opinion Judge Sanborn said:

"The acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the king can do no wrong. There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. There is no reason why a government should not submit its controversies with its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs, as universally as individuals.

"The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view."

113 All the decisions of the Supreme Court of the United States now urged by counsel for the Government, which have any bearing upon the matter in dispute, were urged upon the attention of the Circuit Court of Appeals by the writer of this opinion—then counsel for the United States—and received full consideration. To seek a decision in conflict with the doctrine announced in Christie-Street Commission Co. vs. United States, supra, is to ask this court to disregard the deliberate judgment of a superior court of controlling authority. Apart from all other considerations, such a policy would lead to instability and endless confusion, and is indefensible from every point of view. Furthermore, the doctrine announced in that case commands itself to my judgment. I am unable to perceive either justice or advantage in the procedure upon which the Government insists.

II.

It remains to be considered whether the plaintiff is a corporation, by a proper construction of the act, made subject to pay annually a special excise tax. Section 38 provides:

"That every corporation * * * organized for profit and having a capital stock represented by shares, * * * organized under the laws of the United States or of any State or Territory of the United States, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year."

Subject to exceptions enumerated.

Second. "Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, * * * received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property."

This act has been exhaustively and minutely considered and construed by the Supreme Court of the United States in the cases of Flint vs. Stone Tracy Co., 220 U. S., 107; Eliot vs. Freeman,
114 220 U. S., 178, and Zonne vs. Minneapolis Syndicate, 220 U. S., 187. In the case first cited it was held that the tax is imposed upon the doing of business of the character described; that it is business done in a corporate capacity which is the subject-matter of the tax imposed in the act under consideration; that the requirement to pay such taxes involves the exercise of the privilege, to wit, that of doing business in such corporate capacity, that, therefore, the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable. (Thomas vs. United States, 192 U. S., 363.) On page 171 of the opinion it was said:

"We think it is clear that corporations organized for the purpose of doing business and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus are engaged in business within the meaning of this statute and in the capacity necessary to make such organizations subject to the law."

We gather from this that the corporation subject to the tax must be organized for the purpose of doing business, and, in addition thereto, must be actually engaged in such activities.

The case of Eliot vs. Freeman involved joint stock companies not organized under the laws of the State. For this reason it was held that the law did not apply.

A more specific consideration of the act as applied to a subject such as is now before us is disclosed in the case of Zonne vs. Minneapolis Syndicate. There the corporation, as was admitted by the pleadings, was originally organized for and engaged in the business of letting stores and offices in a building owned by it and collecting and receiving rents therefor. Subsequently it demised and let all of the tracts belonging to it to three trustees for the term of 130 years at an annual rental of $61,000, to be paid by said lessees to said corporation. At that time the corporation caused its articles of incorporation, which had theretofore been those of a corporation organized for profit, to be so amended as to show that the sole purpose of the corporation should be to hold the title to the property subject to the lease aforesaid, and, for the convenience
115 of its stockholders, to receive and to distribute among them from time to time the rentals that accrued under this lease and the proceeds of any disposition of the land. Its sole function then was to collect the rents and distribute them as dividends to its stockholders, and ultimately to dispose of the property and distribute the proceeds. This is what is actually done by the plaintiff corporation in this case. Defendant contends that because its articles of incorporation, which were originally those of a corporation organized for profit, have not been amended, as was done in the Zonne case, it necessarily remains a corporation organized for and engaged in business, and is, therefore, subject to the tax. In the Minneapolis Syndicate case, the court said:

"As we have construed the corporation tax law (Flint vs. Stone Tracy Co., ante, p. 107), it provides for an excise upon the carrying on or doing of business in a corporate capacity. * * *

"The corporation involved in the present case as originally organized and owning and renting an office building was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property, and had disqualified itself by the terms or reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909."

(Zonne vs. Minneapolis Syndicate, supra, p. 190–191.)

The only difference between that case and the case at bar which could possibly militate to the disadvantage of the plaintiff herein

116 is that here there has been no act of reorganization of the corporation, by the terms of which it has disqualified itself from any activity in respect to the property. But by its lease it has done so as effectively as did the Minneapolis Syndicate. There the property was leased to trustees at a fixed sum and for a long period. In each case the lessor has wholly parted with the control and management of the property, provided, of course, the terms of the lease are observed. In the Minneapolis case the corporation was originally engaged in the business of letting stores and offices in a building owned by it, but indiscriminately to various tenants, after the usual manner of renting such a property. Here the corporation was specifically organized for the purpose merely of holding the title to the property and of renting it to a specific tenant. I am of opinion that this does not disclose an organization for business purposes as contemplated by the act. True, the corporation was organized under the chapter relating to business and manufacturing corporations, but that is because this is the only chapter applicable to such a corporate existence. Its purposes may well satisfy the requirements of the Missouri statute without bringing them within the purview of the act of Congress. The power of ultimate sale and distribution of proceeds is alike in both cases, as is the express or implied power as title holder to enforce the provisions of the lease.

I can not believe that the act of reorganization and amendment of charter was controlling in the Zonne case. It was present, and was recited as adding additional force to the construction there adopted. But, as we have seen, two things must concur to render a corporation subject to this tax. It must be organized for the purpose of doing business, and it must be actually engaged in that business. The Minneapolis Syndicate, after the demise of the property to the trustees—a single tenant—was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property. In this case the Realty Com-

117 pany was organized to do no more than this, and, in any event, it is not actively engaged in doing more. Under the terms of this charter reorganization is unnecessary, and if effected, would only tend to emphasize a situation already existing. As stated by the learned district attorney in his brief, "plaintiff has arranged its matters in such a satisfactory and convenient manner as to relieve it during the period of this present lease from actively participating in the management of the property in question and from being annoyed with the usual inconveniences and problems that are involved in the management and control of property generally." It has, in fact, parted entirely with the management and control of this property during the life of the lease. Its charter gives it no power to acquire other property, nor to deal in property generally; it gives it no power to lease to any one but this single tenant, nor to engage in the business of leasing property generally; it gives it no power to

operate upon the expiration of this lease, in default of a renewal, but simply to dispose of the property by sale and distribute the proceeds. And even though a corporation be deemed to have been organized for business purposes, if it abstains from doing business, it is not subject to the tax.

This entire transaction was completed long prior to the enactment of this excise tax law. Its object was not to defraud the Government of revenue. The Emery, Bird, Thayer Dry Goods Company, a corporation, pays excise taxes upon the net income of its business. The Government is not defrauded of its revenue. The net income of the Dry Goods Company is entitled to credit for all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals required to be made as a condition to the continued use or possession of property. If the title were held otherwise, the Dry Goods Company, which is the only active business corporation, would be entitled to such a deduction. This is evidently

118 an arrangement merely for the sake of convenience in order that the capital of the Dry Goods corporation may not be withdrawn from its business operations and invested in lands, leasehold interests, and appurtenant buildings. The stockholders of the Dry Goods Company really own this property; for convenience they hold it through this corporate agency; the rental paid is the income or return upon this investment. Held in the names of the individuals, the property could not be directly taxed; held in the corporate name it is taxed, if at all, only by virtue of the form of its ownership. This cannot be done. Taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes. (Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429; same case, 158 U. S., 601.) The language in these opinions

"Was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualifications of excise duty."

(Flint vs. Stone Tracy Co., supra, p. 149.)

I am unable to distinguish this case in principle from that of Zonne vs. Minneapolis Syndicate, supra, and it follows that the finding and judgment must be for the plaintiff.

119 UNITED STATES OF AMERICA, *sct:*

I, John B. Warner, clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true, and complete copy of the record, assignment of errors, and all proceedings in case #3821, The Emery, Bird, Thayer Realty Company, a corporation, plaintiff, vs. The United States of America, defendant, in accordance with the præcipe for transcript filed herein by Leslie J. Lyons, Esq., United States district attorney, a copy of which præcipe

is hereto attached, as fully as the same appears on file and of record in my office.

Witness my hand as clerk, and the seal of said court. Done at office in Kansas City, Missouri, this 14th day of February, A. D. 1913.

[SEAL.] JOHN B. WARNER, *Clerk.*

(Indorsement on cover:) File No. 23556. W. Missouri D. C. U. S. Term No., 981. The United States, plaintiff in error, vs. Emery, Bird, Thayer Realty Company. Filed February 20, 1913. File No., 23556.

INDEX.

	Page.
STATEMENT OF THE CASE	1–5
SPECIFICATIONS OF ERROR	5
ARGUMENT	6–21
I. The District Court was without jurisdiction of the suit	6–13
The remedy, if any, is an action against the collector, expressly provided by statute	6, 9
Nichols v. *United States*, 7 Wall. 122.	
Where a revenue act expressly provides a particular remedy for the recovery of taxes illegally assessed and paid, such remedy is exclusive	9
Arnson v. *Murphy*, 109 U. S. 238, 243.	
Cheatham v. *United States*, 92 U. S. 85, 88.	
Nichols v. *United States*, *supra*.	
Hence a suit against the United States does not lie	11
II. The Realty Company was "engaged in business" within the meaning of the Corporation Tax Act of 1909	14–21
Corporation Tax Cases, 220 U. S. 107, 171.	
CONCLUSION	21

CASES CITED.

	Page.
Arnson v. *Murphy*, 109 U. S. 238	9
Cheatham v. *United States*, 92 U. S. 85	11
Chesebrough v. *United States*, 192 U. S. 253	11
Christie-Street Commission Co. v. *United States*, 136 Fed. 326	12
City of Philadelphia v. *Collector*, 5 Wall. 720	10
Collector v. *Hubbard*, 12 Wall. 1	10
Corporation Tax Cases, 220 U. S. 107	14, 15
D. M. Ferry & Co. v. *United States*, 85 Fed. 550	9
Dooley v. *United States*, 182 U. S. 222	8, 13
Edison Electric Illuminating Co. v. *United States*, 38 Ct. Cl. 208	9
Erskine v. *Van Arsdale*, 15 Wall. 75	10
McCoach v. *Minehill & Schuylkill Haven R. R. Co.*, 228 U. S. 295	19
Medbury v. *United States*, 173 U. S. 492	8
Nichols v. *United States*, 7 Wall. 122	6
Reid v. *United States*, 211 U. S. 529	11
Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397	13
Sybrandt et al. v. *United States*, 19 Ct. Cl. 461	9
United States v. *Kaufman*, 96 U. S. 567	6
United States v. *Savings Bank*, 104 U. S. 728	7
Zonne v. *Minneapolis Syndicate*, 220 U. S. 187	16

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
EMERY, BIRD, THAYER REALTY COMPANY. } No. 117.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This action was brought by defendant in error against the United States in the District Court of the United States for the Western District of Missouri on February 10, 1912, under section 1 of the so-called Tucker Act of March 3, 1887, 24 Stat. 505 (now section 24, par. 20, of the Judicial Code), to recover $2,060 alleged to have been illegally collected from defendant in error under the Corporation Tax Act of August 5, 1909, 36 Stat. 11, 112 (R. 2–10, 64, 71). Judgment went against the United States for the sum claimed (R. 59), and thereupon this writ of error was sued out.

The facts are as follows:

Prior to January 14, 1908, the Emery, Bird, Thayer Dry Goods Company (hereinafter called the Dry Goods Company), a corporation organized under the laws of Missouri and engaged in the business of buying and selling goods, wares and merchandise in its department store in Kansas City, Missouri, owned and possessed certain real estate, leasehold interests, buildings and improvements in that city and used and occupied said property for the purposes of its business (R. 66–67). On January 14, 1908, the Emery, Bird, Thayer Realty Company (hereinafter called the Realty Company) was organized under the laws of the State of Missouri for the following purposes, as set forth in its articles of association: (1) to acquire and hold the title to the real estate and leasehold interests above mentioned, then owned and held by the Dry Goods Company; (2) to perform all the covenants and agreements in the leases of said leasehold premises to be performed by the lessee therein and its successors and assigns, and to enforce the performance of all the covenants and agreements of said leases to be performed by the lessors therein, and for these purposes to make such contracts, do such acts, incur such indebtedness, and prosecute such suits as might be necessary and proper therefor; (3) to lease all of the aforementioned property to the Dry Goods Company for such time, upon such terms, and for such rental

as might be from time to time mutually agreed upon, provided that any such lease should produce a net dividend of 6% for the stockholders of the Realty Company; and (4) to sell, assign and convey any and every part of the property at such times, to such persons, and on such terms as might be from time to time determined by two-thirds of the entire capital stock of the Realty Company (R. 12–14, 64–66).

Thereafter, on February 1, 1908, the Dry Goods Company by warranty deed sold and conveyed to the Realty Company all the property in question (R. 14–16, 67); and on the same day the Realty Company leased said property to the Dry Goods Company for a term of 25 years at an annual rental of $108,000, payable in quarterly instalments, the Dry Goods Company agreeing, in addition, to pay all the taxes on the premises during the continuation of the lease, to keep all the buildings thereon insured for the use and benefit of the Realty Company, to pay all the rentals and charges falling due on the leasehold portion of the premises, and to keep and perform all the obligations of the original lessee in relation thereto (R. 18–20, 67). The Realty Company covenanted to rebuild in case of destruction by fire, and was given the right of reentry for breach of covenant by the Dry Goods Company (R. 19).

The Realty Company was organized for a term of 50 years (R. 12). The two leasehold estates in

question were, respectively, for terms of 99 years from April 1, 1890, and of 84 years from March 1, 1905 (R. 20–33, 68).

In the several leases assigned to the Realty Company, the lessee agrees to keep the premises in good repair and free from nuisance (R. 23, 24, 27). In one lease the lessee covenants to pay all taxes, liens, etc., charged against the premises, to keep the premises insured to their full value, and in the event of damage or destruction by fire, to rebuild with all reasonable dispatch, applying the insurance money thereto (R. 23, 24); in the other these obligations are borne by the lessor* (R. 27). One lease gives the lessee power to mortgage the leasehold and to make one-half the insurance payable to the mortgagee (R. 23); the other authorizes the lessee to make any desired alterations or improvements on the premises (R. 26, 32).

The Realty Company made return of its net income for the years 1909 and 1910 at the demand of the Collector of Internal Revenue, and under protest (R. 34, 36); and likewise paid under protest the tax of $1,030 assessed against it under the Corporation Tax Law for each of those years (R. 35, 37). The Realty Company's total income for each year was $108,000, the annual rental on the prop-

* The extension lease on this latter parcel stipulates for the payment by the lessee of all taxes, liens and encumbrances after March 1, 1920, and their payment by the lessor before that date; and provides that the lessee, upon discharging this obligation of the lessor, shall be subrogated to the rights of the creditor or lienor (R. 32–33).

erty leased by it to the Dry Goods Company (R. 69).

On June 30, 1911, the Realty Company duly filed with the collector its claim for the refund of the taxes so paid, which claim was transmitted to the Commissioner of Internal Revenue; and in July, 1911, the Commissioner refused and rejected the claim (R. 71).

To the petition setting forth these facts the United States demurred, and its demurrer being overruled it answered averring the legality of the assessment and challenging again the jurisdiction of the court.

The District Court held that it had jurisdiction and found both as a matter of fact and of law that the Realty Company was not " doing business in a corporate capacity " within the meaning of the Corporation Tax Law (R. 71, 72), and accordingly rendered judgment in its favor (R. 59).

SPECIFICATIONS OF ERROR.

The 19 errors assigned (R. 60–62) all come down to two points: the question of jurisdiction, and that of the Realty Company's liability under the Corporation Tax Act.

It is insisted for the Government that the District Court erred (1) in holding that it had jurisdiction of the suit, and (2) in holding that the Realty Company was not subject to the tax imposed by the Corporation Tax Act of 1909.

ARGUMENT.

I.

The District Court was without jurisdiction of the suit.

The court below sustained its jurisdiction under section 1 of the Tucker Act on the theory that the claim was one founded upon a law of Congress and so came within the first class of cases mentioned in that section (R. 73). This position is untenable.

In *Nichols* v. *United States,* 7 Wall. 122, 129, this court held that under the original act establishing the Court of Claims and conferring on it power to hear and determine all claims founded upon any law of Congress, the Court of Claims had no jurisdiction of a suit to recover customs duties illegally assessed and paid. It was stated that the same rule would apply to suits brought to recover internal revenue taxes illegally collected (p. 130). The opinion concludes with the broad statement " that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims " (p. 131).

This proposition was modified by *United States* v. *Kaufman,* 96 U. S. 567, which held that the Court of Claims had jurisdiction of a suit to recover a claim for an excess of tax stamps used by the claimant which had been allowed by the Commissioner of Internal Revenue under §3426 of the Revised Statutes, but which the Treasury

Department had refused to pay. It was there said (p. 569):

> We know it was held in *Nichols* v. *United States* (7 Wall. 122) that the Court of Claims did not have jurisdiction of a suit to recover back duties upon imported goods illegally assessed, and that the same rule applied to internal revenue cases where the decision of the commissioner upon appeal was adverse to the claimant. In such cases, a special remedy is given by suit against the collector if the necessary steps are taken to secure the right to sue at all. The reason is that as the liability is one created by statute, the special remedy provided by the same statute is exclusive.

In *United States* v. *Savings Bank,* 104 U. S. 728, it was held that the rule laid down in the *Nichols* case did not apply to an action brought to recover back internal revenue taxes and penalties illegally collected, recovery of which had been allowed by the Commissioner of Internal Revenue as provided by §§3220 and 3228, R. S., but refused by the Treasury Department; and that the Court of Claims had jurisdiction of such a suit. This court said (p. 734):

> * * * Until an appeal is taken to the commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. If on the appeal the claim is rejected, an action lies against the collector (Rev. Stat., sec. 3226),

> and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the government in the Court of Claims. This, as it seems to us, is the logical result of the legislation of Congress upon the subject. A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims.

In *Medbury* v. *United States,* 173 U. S. 492, 495–496, this court, in discussing the *Nichols* case, said (p. 496):

> The system spoken of in the opinion provided a general scheme for the collection of the revenue, and also provided adequate means for the correction of errors by a resort to a suit in a court of law prosecuted in the ordinary way. While it gave rights, it provided a special but full and ample remedy for their infringement. It certainly could never be presumed that Congress, while thus furnishing an adequate method for the correction of errors, intended that the party aggrieved might refuse to follow such remedy and resort to some other and different mode of relief. It is quite plain that the remedy thus specially indicated was exclusive, and that the act giving jurisdiction to the Court of Claims had no application.

Dooley v. *United States,* 182 U. S. 222, held that under section 1 of the Tucker Act the Circuit Court had jurisdiction of a suit brought to recover

back duties paid under protest at the port of San Juan, Porto Rico, as a claim founded upon a law of Congress. The *Nichols* case was distinguished as follows (p. 225):

> In the *Nichols* case, it was held that, as there was a remedy by action against the collector, expressly provided by statute, that remedy was exclusive. In *DeLima* v. *Bidwell* we held that although no other remedy was given expressly by statute than that provided by the Customs Administrative Act, there was still a common law remedy against the collector for duties exacted upon goods not imported at all; but it does not therefore follow that this remedy is exclusive, and that the importer may not avail himself of his right of action in the Court of Claims.

The *Kaufman* case has been followed by the Court of Claims in *Sybrandt et al.* v. *United States,* 19 Ct. Cl. 461, and *Edison Electric Illuminating Co.* v. *United States,* 38 Ct. Cl. 208; and the *Nichols* case by the Circuit Court of Appeals for the Sixth Circuit in *D. M. Ferry & Co.* v. *United States,* 85 Fed. 550 (opinion by Circuit Judge Taft).

The rule to be deduced from the decisions of this court may be thus stated: where a revenue act expressly provides a particular remedy for the recovery of taxes illegally assessed and paid, that remedy is exclusive, *Arnson* v. *Murphy,* 109 U. S. 238, 243, and a suit based on such payment does not lie under the first section of the Tucker Act.

Tested by this rule, the present suit was improperly brought in the District Court.

The Corporation Tax Act of 1909 contains the following provision:

> All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section. (Act of August 5, 1909, §38, 36 Stat. 112, 117.)

It was held in *City of Philadelphia* v. *Collector,* 5 Wall. 720, 731, that the provisions of the act of May 1, 1862, now embodied in §§3220 and 3226 of the Revised Statutes,* by necessary implication create a right of action against collectors of internal revenue to recover back taxes illegally or erroneously assessed. *Collector* v. *Hubbard,* 12 Wall. 1, 13, 14; *Erskine* v. *Van Arsdale,* 15 Wall. 75.

---

* §3220 provides that "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized * * * to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him * * *."

§3226 provides that "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided,* That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

These two sections are obviously included within the above provision of the Corporation Tax Act as "laws relating to the * * * remission and refund of internal revenue taxes." It follows that the tax statute in the case at bar does expressly provide a particular remedy for the recovery of unlawful payments made under protest, namely, an action against the collector (*Cheatham* v. *United States,* 92 U. S. 85, 88); and, hence, that a suit against the United States does not lie.

The case of *Chesebrough* v. *United States,* 192 U. S. 253, contains nothing to suggest a contrary conclusion. That case merely decided that a claimant who had purchased and used $600 worth of internal revenue stamps without protest or notice, and whose subsequent application to the Commissioner of Internal Revenue for a refund of the amount so paid had been denied, was given no cause of action against the United States for the recovery of that sum by §§3220, 3226, 3227 and 3228 of the Revised Statutes. The action was apparently brought not under the Tucker Act, but under §3220; for under the Tucker Act the writ of error would not have lain, the amount involved being less than $3,000. *Reid* v. *United States,* 211 U. S. 529, 539. The question whether an action could ever be brought against the United States under §3220 was not discussed; and obviously there was no need for such discussion. That the court was not ob-

livious to the jurisdictional question, however, appears from the following passage (p. 263):

> In *United States* v. *Savings Bank,* 104 U. S. 728, it was held that the allowance of a claim by the Commissioner was equivalent to an account stated between private parties and binding on the United States until impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, while if the claim were rejected, an action might be prosecuted against the collector. It was not, however, ruled that in the latter situation a recovery could be had if the original payment had been voluntary and without objection.

In *Christie-Street Commission Co.* v. *United States* (C. C. A. 8th C.), 136 Fed. 326, relied on by the court below, it was held that the United States was suable under section 1 of the Tucker Act for internal revenue taxes illegally collected, when a claim for their repayment had been presented to, but not allowed by, the Commissioner of Internal Revenue. We submit that this conclusion was reached through a misconception of the distinctions upon which the cases subsequent to the *Nichols* case proceeded, and a consequent failure to grasp the rules there laid down. The court also points out that a suit against a collector of internal revenue to recover taxes illegally exacted is cognizable in the Circuit Court under the Judiciary Act as one aris-

ing under both the Constitution and the laws of the United States (citing *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 406), and then admits its inability to perceive any distinction between a claim arising under, and one founded upon, a constitution or a law (136 Fed. 331). But the distinction is perfectly patent when the different purposes of the two statutes are borne in mind. The Judiciary Act was designed to confer jurisdiction on the courts of the United States, either originally or by removal, of all suits involving Federal questions; and its provisions are to be liberally construed to carry out that purpose. The first section of the Tucker Act, as we have shown, was intended to give a remedy for governmental wrongs by suit against the United States in strictly limited classes of cases, and then only when no other remedy was specifically provided by statute. This difference shows the utter irrelevance of the *McClain* case and demonstrates the weakness of the reasoning employed by the Circuit Court of Appeals.

Unless the holding of the *Nichols* case

> * * * that this [statutory] remedy was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give to the taxpayer and importer a different and further remedy (*Dooley* v. *United States, supra,* 225)

is to be overruled, the jurisdiction of the District Court in the instant case can not be sustained.

II.

The Realty Company was "engaged in business" within the meaning of the Corporation Tax Act of 1909.

The language of §38 of the act of August 5, 1909, has been so thoroughly interpreted in its present aspect by recent decisions of this court that little remains to be done but to ascertain whether the instant case falls within one or the other of the categories established by those decisions.

One of the original *Corporation Tax Cases* decided by this court *sub nomine Flint* v. *Stone Tracy Co.*, 220 U. S. 107, was that of the Park Realty Company. That company was organized with wide powers to deal in real estate by buying, selling or leasing lands and buildings and by erecting, conducting, managing or leasing hotels, apartment houses, etc. (220 U. S. 170). It was averred in the bill and admitted by demurrer, however, that during the taxable period the Park Realty Company was owner of a parcel of real estate with the building erected thereon, known as the Hotel Leonori,

> which said real property * * * was leased for a term of twenty-one years to one Charles Leonori at the specified annual rental of $55,000, which said lease expires September 30, 1914. * * * That said defendant Park Realty Company [was] engaged in no other business except the management and leasing of the real property

> aforesaid * * * and [derived] no other or further income except from the rental of its said real property as aforesaid, and [had] no assets except said real property, and the income therefrom. (Record, Cedar Street Co. v. Park Realty Co., No. 415, October Term, 1910, pp. 3–4.)

Of that and other realty companies with more extensive powers this court said (220 U. S. 171):

> * * * It remains to consider whether these corporations are engaged in business. "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes,* 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. 1, p. 273.
>
> We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

It is to be observed that the paragraph last quoted is a cumulative description of the activities

of all the realty companies under consideration, and therefore can not be taken to mean that any one company must indulge in all or several of the enumerated activities in order to be engaged in business within the meaning of the statute.

In *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, a contrary result was reached in the case of a corporation originally organized for and engaged in the business of letting stores and offices in a building owned by it and collecting and receiving rents therefor, but whose articles of incorporation had been amended at the time of suit so as to make the corporation's sole purpose that of holding title to its lands and buildings subject to a 130-year lease to three trustees at an annual rental of $61,000, and of receiving and distributing among its stockholders said rental as it accrued, as well as the proceeds of any disposition of the land. Under the circumstances this court had no difficulty in concluding that the corporation no longer came within the Tax Act. It was said (p. 190):

> As we have construed the Corporation Tax Law (*Flint* v. *Stone Tracy Co., ante,* p. 107), it provides for an excise upon the carrying on or doing of business in a corporate capacity. We have held in the preceding cases that corporations organized for profit under the laws of the State, authorized to manage and rent real estate, and being so engaged, are doing business within the meaning of the law, and are therefore liable to the tax imposed.

> The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909.

We think that the present case comes under the ruling with regard to the Park Realty Company, and not within the Minneapolis Syndicate decision. Unlike the latter concern, the Realty Company has not disabled itself from doing business in connection with its property. On the contrary, it has reserved the right to reenter and take possession of that property upon default by the lessee Dry Goods Company, and to dispose of the property as its

stockholders see fit upon the termination of the lease. It has obligated itself to the Dry Goods Company to rebuild in case of fire; and if the latter company defaults on its sub-lease, the Realty Company's obligations to the lessors under the original leases will at once revive and become practically (as they now are legally) effective. This is a very different situation from that of the Minneapolis Syndicate, which was merely raised as a dead hand between the trustees and the stockholders for the purpose of holding title and distributing dividends.

The case of the Park Realty Company, however, is almost identical with the present one. There is nothing to show that its "management" of the Hotel Leonori amounted to anything more than the collection of the annual rental and its payment to the stockholders; at all events it appears of record (from the passage heretofore quoted) that this activity was its only source of income. The case at bar, where the Realty Company occupies the dual position of lessor and lessee with regard to much of the property in question, is actually a stronger instance of corporate activity than that presented by the Park Realty Company. The present company's charter powers, it is true, are not quite so wide; it has authority, however, to deal freely with the Dry Goods Company in negotiating a lease of its property to that company, and upon the termination of such a lease to sell freely to the whole world. There is nothing in the cases cited to suggest that a wider charter power is necessary

to enable a corporation to be "engaged in business" within the meaning of the act.

We do not believe that the case of *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295, militates against the conclusion that the Realty Company was here engaged in business. There the Minehill Company had leased a railroad to the Philadelphia and Reading Railroad Company for a term of 999 years at a rental amounting to 6% upon the Minehill Company's capital stock. The lessee agreed to keep the road in good repair, to use and efficiently operate it, and to return it to the lessor at the expiration or other termination of the lease. The lessor company was merely to maintain its corporate existence during the term of the lease and exercise its corporate powers when requested by the lessee in order to enable the latter to enjoy all its rights and privileges with respect to the property demised.

This court concluded from the above facts,

> that the Minehill Company was not, during the years 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. (pp. 303-304.)

This was apparently the principal ground of the decision,—that the company was not doing the business for which it was organized, but had gone out of business with respect thereto.

But in the present instance the Realty Company is doing exactly the business for which it was organized, namely, holding and possessing property in the capacity of owner and lessee, and leasing the same to the Dry Goods Company. Consequently the decision in the *Minehill* case is not controlling of the present question.

To hold the Corporation Tax Act inapplicable to the Realty Company would put a premium upon the subdivision and distribution of a business among several corporations for the purpose of evading the tax. If the property in question had continued to be held by the Dry Goods Company, that company would have obtained a deduction merely for the amount of rental paid by it under the original leases. Under the present arrangement it continues to pay, and receive a deduction for, that rental; in addition it pays a rental of $108,000 per annum to the Realty Company for which it is also entitled to a deduction under the act. Yet the identity of interest between the two companies is quite apparent, and indeed is conceded by the court below (R. 72). The case then presents squarely the question whether it is possible by such a manipulation of ownership to reduce the amount of taxable income of a corporation engaged in business and subject to the act. If so, there appears to be nothing to prevent any corporation using real estate in its business from paying out all its profits as rental thereon to a dummy corporation acting as lessor, and thus leaving no

income for the tax to be assessed upon. We think this court will hesitate long before holding that the language of the Corporation Tax Act contemplates or necessitates such a conclusion.

The District Court's " finding of fact " that the Realty Company was not " a corporation doing business in a corporate capacity within the true intent and meaning " of the Corporation Tax Act of 1909 (R. 71) is obviously not a finding of fact at all, but a legal inference; and its conclusion of law to the same effect (R. 72) proceeds from a mistaken interpretation of that act.

CONCLUSION.

The judgment below was erroneous and should be reversed, with directions to the District Court to dismiss the petition for want of jurisdiction, or to enter judgment for the defendant.

JOHN W. DAVIS,
Solicitor General.

KARL W. KIRCHWEY,
Attorney.

AUGUST, 1914.

FILED
DEC 5 1914
JAMES D. MAHER
CLE

Supreme Court of the United States,

OCTOBER TERM, 1914.

UNITED STATES,
Plaintiff in Error,

against

EMERY, BIRD, THAYER REALTY COMPANY,
Defendant in Error.

No. 117.

BRIEF FOR DEFENDANT IN ERROR —QUESTION OF JURISDICTION.

Statement.

The District Court of the United States, for the Western District of Missouri, decided that this action was well brought against the United States, and that it was not necessary that the suit should be brought against the Collector of Internal Revenue, who had collected from the defendant in error the tax which was alleged to be illegal. The undersigned, counsel for parties in causes on the docket in which a similar question is raised by the Government, has had leave to file this brief as *amicus curiae* on the question of jurisdiction.

POINTS.

First.

The argument for the plaintiff in error in this case overlooks the origin of suits against officers of the Government to recover for acts done by them in their official capacity. That origin is this: At common law the maxim was that the King could do no wrong. It followed that no suit could be maintained against him. When, however, an officer of the King transcended his authority and did something to a citizen which was in violation of law, the benefit of this maxim was not extended to the officer. On the contrary, the courts were astute to protect the rights of the injured citizen and to assume that the illegal acts, while within the apparent scope of his authority, were not really authorized by the sovereign. Of this character is the following:

Hall *v.* Smith, 2 Bing., 156.

It commonly happened that, in such cases, the government defended the suit and indemnified the officer whose acts were drawn in question. But this circumstance did not affect the theory of the suit.

U. S. Rev. Stat., §989.
De Lima *v.* Bidwell, ~~181~~ 182 U. S., 1, 177 (1901).

The same rule was adopted by the courts of the United States as part of the common law which our ancestors brought with us to this country, and the exemption from suit was held to extend to the United States Government and to the government of each State. But conversely, it was held that

an officer of the government who transcended his power or committed an illegal act *colore officii*, was personally liable.

Meigs *v.* McClung's Lessee, 9 Cranch, 11.
Osborn *v.* Bank United States, 9 Wheat., 738.
United States *v.* Lee, 106 U. S., 196.
Britton *v.* Butler, 9 Blatchf., 457.
Story on Agency, §319b, §320.

Among the suits that were brought against officers of the United States Government, to recover for acts alleged to be in violation of law, were suits against collectors of customs who had levied taxes upon imports alleged to be erroneous and excessive. In such cases they sought the benefit of the rule that a voluntary payment, even if erroneously made, could not be recovered, and that an agent who had collected money for his principal and paid it over to the principal, was not liable to suit even though it should appear that the payment was erroneously made, unless he had been notified not to pay and that a personal claim would be made against him. For this reason it was held that no suit could be maintained against the collector of customs to recover duties levied by him in excess of the legal amount, unless he had been notified that the exaction was illegal and that a suit would be brought against him to recover the amount claimed to be unlawfully demanded.

Elliott *v.* Swartwout, 10 Peters, 137 (1836).

At a subsequent period, the Parliament of Great Britain and the Congress of the United

States passed acts which were designed to remedy this defect in the common law and to give to persons injured by the action of government officials, within the scope of their authority, a direct remedy against the government in itself. In England this was done by what was called "petition of right."

United States *v.* Lee, 106 U. S. 196, 205.

In the United States, also a court, called the Court of Claims was established by the Act of February 24, 1855, (U. S. Rev. Stats. §1059), before which persons having claims against the United States Government of a certain character were authorized to present their demand and ask for reimbursement. In pursuance of the same liberal policy, the jurisdiction to entertain such claims was conferred upon the Circuit and District Courts of the United States by the Act of March 3, 1887, known as the Tucker Act, 24 Stats. 505, reënacted in the Judicial Code, Section 24, Clause 20.

Before this latter Act was passed, this Court had before it the question of jurisdiction of a suit directly brought against the United States.

Nichols *v.* United States, 7 Wall. 122 (1868).

The court, in that case, considered that the policy of the revenue laws, as they then existed, was such that the jurisdiction to entertain suits against the United States in cases arising under them had not been conferred upon the Court of Claims. It must be observed, however, that in the Nichols case no protest had been made at the time of payment of the duties alleged to have been unlawfully exacted. There was, therefore,

as the court held, no remedy at common law. The statute in reference to suit against the collector limited the right of recovery to cases where there had been a protest. It followed, necessarily, that there was no right of action whatever. The language of the court as to the exclusive nature of the jurisdiction must be taken in reference to this state of facts, and can have no application to changes in legislation whereby the right of action and the remedy were both extended.

Dooley *v.* United States, 182 U. S. 222.

At page 225 the court expressly limited the decision in the Nichols case and sustained an action brought in the Circuit Court to recover taxes which had been levied by the collector upon goods imported into Porto Rico from New York.

S. P. Medbury *v.* United States, 173 U. S. 492, 497 (1899).

Here, also, the court limited the Nichols decision to a case where the right and the remedy were both created by one statute, and it must be inferred that Congress intended the remedy to be exclusive. It held that the act in question gave a right to obtain a warrant from the Secretary of the Interior, but provided no remedy in the case of an erroneous decision by him, and that, therefore, the remedy was in the Court of Claims.

The decisions in the Circuit Courts of Appeals are in harmony with these decisions of this Court.

Christie Street Commission *v.* United States, 136 Fed. 326 (1905);

United States *v.* Shipley, 197 Fed. 265 (1912).

In these cases the courts in the third and eighth circuits hold that the first clause of the Tucker Act is broad enough to cover claims against the government for the repayment of monies alleged to have been received by it in contravention either of the Constitution of the United States or of any law of Congress. In other words, it holds that the language "First, all claims founded upon the Constitution of the United States or any law of Congress" includes claims for the repayment of monies alleged to have been exacted in violation of the Constitution, and also claims arising under any special act of Congress giving relief in a particular class of cases.

Second.

The rule is well settled that a statute "remedial in its character and relating to the law of procedure is to be liberally construed with reference to the purpose of its enactment."

Bechtel *v.* United States, 101 U. S. 597, 314.

Applying this rule to the Tucker Act, as re-enacted in the Judicial Code, is it not plain that the object of the statute was to provide a direct remedy against the United States, which would be more simple than the indirect method of suing an officer of the Government, who would in turn be indemnified by the Department for which he acted? The statute in question was passed to enable the Government of the United States to do speedy justice to persons claiming to be aggrieved by the action of administrative officers, especially

when they were done under color of an act of Congress in violation of the Constitution of the United States. It would be a violation of the principle of construction already referred to to limit the general language of this act by construction.

Indeed it might fairly be contended that the effect of the Tucker Act was to substitute the remedy provided for by it for any existing remedy against a Government official. It covers the subject matter of the previous legislation and affords an entirely different remedy. *United States* v. *Claflin*, 97 U. S. 546. It is not necessary for the decision of this case to press this proposition, but it is referred to as illustrating the disposition of the Court to give full effect to new remedial legislation.

Third.

On the point of jurisdiction the judgment should be affirmed. Counsel for defendant in error will argue the other questions involved.

EVERETT P. WHEELER,
Amicus Curiae.

FILED
OCT 26 1914
JAMES D. MAHER
CLERK

No. 117.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

JAMES G. SMART *and*
ALBERT R. STROTHER,
Attorneys for Defendant in Error.

INDEX.

Page

Statement of the Case 1-3

Argument 4-29

I. The District Court had jurisdiction. 4-20

Nichols v. *United States*, 7 Wall. 122, discussed 4-6, 8-11

The statute gives no special exclusive remedy 8-11

The cases subsequent to the *Nichols Case* establish the proposition that the court had jurisdiction in this case 11-20

II. The Realty Company was not liable to the tax 20-29

The Corporation Tax Cases, 220 U. S. 107.

The *Zonne Case*, 220 U. S. 187.

The *Minehill Case*, 228 U. S. 295.

The judgment should be affirmed 29

Cases Cited.

Campbell v. *United States*, 107 U. S. 407. 15

Cary v. *Curtis*, 3 How. 236 9

Chesebrough v. *United States*, 192 U. S. 253. 16

Christie-Street Com. Co. v. *United States*, 136 Fed. 326 20

Defiance Water Co. v. *Defiance*, 191 U. S. 184. . . . 19

Dooley v. *United States*, 182 U. S. 222. 15

INDEX (Cont'd.)

	Page
Dooley v. *United States*, 183 U. S. 151	16
Eliot v. *Freeman*, 220 U. S. 178	22
Flint v. *Stone Tracy Co.*, 220 U. S. 107	22
McCoach v. *Minehill & Schuylkill, Haven R. R. Co.*, 228 U. S. 295	28
Minnesota v. *Hitchock*, 185 U. S. 373	19
Nichols v. *United States*, 7 Wall. 122	4
Philadelphia v. *Collector*, 5 Wall. 720	9
Swift Company v. *United States*, 105 U. S. 691; S. C. 111 U. S. 22	14
United States v. *American Tobacco Co.*, 166 U. S. 468	12
United States v. *Finch*, 206 Fed. 95	20
United States v. *Hyams*, 146 Fed. 15	20
United States v. *Kaufman*, 96 U. S. 567	6
United States v. *New York & Cuba Mail Steamship Co.*, 200 U. S. 488	17
United States v. *Nipissing Mines Co.*, 206 Fed. 431	29
United States v. *Savings Bank*, 104 U. S. 728	11
Zonne v. *Minneapolis Syndicate*, 220 U. S. 187	23

No. 117.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

THE EMERY, BIRD, THAYER REALTY COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

STATEMENT.

The statement of facts in the brief on behalf of the United States is substantially correct but we desire to add a few words to those there set out. The leasehold estates held by the Dry Goods Company and transferred to the Realty Company were created by three leases

instead of two. One lease was from the trustees of the Boston Ground Rent Trust for a term of 99 years from April 1, 1890. It contained among other things, an agreement that "all buildings, fixtures and improvements shall be and remain the property of the lessors and the said lessee covenants and agrees upon the expiration or lawful determination of this lease to yield up the same in good condition and repair, without any compensation therefor" (R. 24). The second lease was for a term of 10 years from March 1, 1905, extended by a later agreement for 5 years more, so as to expire on March 1, 1920. This lease authorized the lessee to add, not less than 2, nor more than 3 stories to the building on the leased premises, which additional stories should become part of the realty and the property of the lessor (R. 26-31). The third lease, made October 7, 1907, demised the same property as the second and was for a term of 69 years from March 1, 1920. This lease required the lessor to pay all taxes and assessments on the property and any encumbrance thereon up to March 1, 1920, and to deliver the premises on that day free and clear of all liens and encumbrances to the lessee. The lessee was to pay all taxes and assessments on the property from March 1, 1920, to March 1, 1989, and in case of the lessor's failure to pay any encumbrance as agreed, it could pay the same and be subrogated to the rights of the encumbrancer or reimburse itself out of accruing rents. The lessee also could remodel the building as it saw fit (R. 31-33).

The District Court, after finding the execution of the lease from the Realty Company to the Dry Goods Company, further found that "upon the execution of said lease, said Emery, Bird, Thayer Dry Goods Company, in pursuance thereof and thereunder entered into the possession of all of said premises, so leased to it by plaintiff, and continuously since that time hitherto has been and still is in the exclusive possession and control thereof performing all the terms and obligations of said lease" (R. 67).

The District Court also made the following further findings of fact, viz (R. 71):

> "Plaintiff was not, at any time during the years 1909, 1910, and 1911, or any of them, and is not now, a corporation doing business in a corporate capacity within the true intent and meaning of said Section 38 of said Act of Congress and was not, as a matter of fact, engaged in or doing any business in said years 1909, 1910 and 1911, or any of them, and during said years did not in fact, act in any corporate capacity, except to hold the usual meetings of its stockholders for the election of directors and the usual meetings of its directors for the election of its officers and for the receipt of the rentals, reserved under said lease from it to said Emery, Bird, Thayer Dry Goods Company, of the property aforesaid, to-wit, said sum of one hundred eight thousand ($108,000.00) dollars yearly and the distribution of such rentals as dividends to its stockholders, in accordance with its said articles of association."

ARGUMENT.

I.

The District Court Had Jurisdiction.

If it is not expressly conceded in the brief for the United States that the Realty Company complied with all the formalities, required by the laws and regulations, to entitle it to recover the taxes in question, if those taxes were illegally exacted of it, there is, at least, no contention to the contrary. The question of jurisdiction may, therefore, be considered on the theory that all such formalities were complied with, and on the further theory that the Realty Company would be entitled to recover in this suit if it had brought its suit in the District Court against the collector instead of against the United States.

The question, therefore, is, can a claimant, with a valid claim to recover internal revenue taxes illegally exacted of it under a misapplication and misconstruction of the internal revenue laws, who has complied with all the formalities required in such cases to entitle it to recover against *somebody*, maintain a suit under the Tucker act, as amended by the Judicial Code, directly against the United States? It is contended on behalf of the United States that it cannot do so, and this contention seems to be founded upon the case of *Nichols* v. *United States*, 7 Wall. 122, and expressions in some later

cases referring to that case. The Nichols case is no such case as the one at bar. It was based on claims which antedated the passage of the original Court of Claims act, and the claimant had not complied with any of the provisions of the law, existing at the time the claims arose, which conditioned his right of recovery, but sought to evade them by suing in the Court of Claims. It was said in that case (p. 128):

> "It is clear, therefore, that the appellants are without remedy, unless a new liability has been imposed on the Government by the Act creating the Court of Claims.
>
> Does this act confer on the appellants any further or different rights than they had prior to its passage? If not, there is an end to this suit."

It is in the light of these facts that the statements in regard to jurisdiction must be construed. The court considered not only the customs laws, which were the only ones properly before the court, but also the general features of the internal revenue laws which were not before the court at all. The conclusion is thus stated (p. 131):

> "The mischiefs that would result *if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims,* forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws.

> Without pursuing the subject further, we are satisfied that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims." (Italics ours.)

To our minds, the controlling feature in the Nichols case and the one which brought about the decision was the fact that the claimant there was evidently trying to evade the law and seeking to recover on a claim without merit, because he had wholly failed to comply with the provisions of the governing statutes which conditioned his right to recover. In the case at bar, on the contrary, no such state of facts exists; and we submit that in view of this fact and also in view of the later decisions, the court should hold that the Nichols case is not of controlling force in this case.

The brief for the United States concedes that the proposition announced in the Nichols case has been modified and cites some of the later cases. We desire to call the court's attention to such of the later decisions as seem to us to bear on the question at issue.

United States v. *Kaufman*, 96 U. S. 567, was a suit in the Court of Claims to recover on a claim for a refund of internal revenue stamp taxes, allowed by the Commissioner of Internal Revenue under Revised Statutes Sec. 3426, which the Treasury Department had refused to pay.

In upholding the jurisdiction, it was said (p. 569):

> "It would seem to be clear from this statement that the allowance of a claim by the Commis-

sioner of Internal Revenue, under the authority of these statutes and treasury regulations, raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant under such circumstances, *and certainly such a claim would be 'founded upon a law of Congress.'*

We know it was held in *Nichols* v. *U. S.* (7 Wall. 122), that the Court of Claims did not have jurisdiction of a suit to recover back duties upon imported goods illegally assessed and that the same rule applied to internal revenue cases where the decision of the Commissioner upon appeal was adverse to the claimant. In such cases a special remedy is given by suit against the collector, if the necessary steps are taken to secure the right to sue at all. The reason is, that as the liability is one created by statute, the special remedy provided by the same statute is exclusive.

But here the case is different. The claim has been presented to and allowed by the proper officer. *The claimant has pursued the statutory remedy to the end.* He is satisfied with the decision that has been given, and insists upon the payment which the government has undertaken to make. No special remedy has been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief, if any can be found applicable to such a case. This is upon the principle that 'a liability by statute without a remedy may be enforced by an appropriate common law action.' *Pollard* v. *Bailey*, 20 Wall. 527. And, as against the government there are no common law actions; any appropriate action within the scope of the jurisdiction of the Court of Claims may be resorted to, unless specially prohibited. *Here the right has been given and a liability found-*

> *ed upon a law of Congress created. Of such liabilities the Court of Claims has jurisdiction,* and no other remedy has been provided." (Italics ours.)

It is evident from the language quoted, that the court in the *Kaufman Case* was of the opinion that the *Nichols Case* held that the jurisdiction did not exist in "internal revenue cases *where the decision of the Commissioner was adverse to the claimant,"* because *"in such cases a special remedy is given by suit against the collector,* if the necessary steps are taken to secure the right to sue at all." (Italics ours.) This seems to us a misconception of the *Nichols Case*, which does not limit the right to sue to "cases where the decision of the Commissioner is adverse to the claimant," but expressly states that "if the commissioner delays his decision beyond the period of six months from the time the appeal is taken, then suit may be brought at any time within twelve months from the date of the appeal." See 7 Wall. l. c. 130. It is further submitted that the opinion in the *Nichols Case* does not expressly say (although it may possibly be implied) that "in such cases *a special remedy is given by suit against the collector."* (Italics ours.) The statute nowhere, *in terms* says the suit may or must be "against the collector" nor does it anywhere say against whom it must be brought. Likewise, it does not say what the form of the action must be nor in what court it must be brought. It does prescribe certain conditions, without compliance with which, it cannot be

"maintained in any court," and it does limit the time within which it must be brought. It is true that in *Philadelphia* v. *Collector*, 5 Wall. 720, it is said (p. 731): "Necessary implications from those provisions (of the statutes) is, that actions *may be maintained* against collectors of the internal revenue to recover back duties illegally or erroneously assessed." (Italics ours.) But this is far from saying that "a special remedy is given by suit against the collector" by the terms of the statute, in such sense as to make it a statutory remedy exclusive of all others. In this same case of *Philadelphia* v. *Collector*, it is further said (pp. 731-732):

> "*Appropriate remedy* to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed, *is an action of assumpsit for money had and received.* (Italics ours.) Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of *assumpsit* for money had and received." Citing:
>
> *Elliott* v. *Swartwout*, 10 Pet. 150.

This "appropriate remedy" was a common law remedy and not given by any statute and was uniformly used until the decision of this court in *Cary* v. *Curtis*, 3 How. 236, holding that after the passage of the act of March 3, 1839 (5 Stat. at L. 339, 348, Ch. 82, Sec. 2), this action would not lie. Congress, being in session when this decision was rendered, thereupon passed the

"explanatory" act of February 26, 1845 (5 Stat. at L. 729, Ch. 22), by which it was enacted "that nothing contained in the second section" of the act of March 3, 1839, *"shall take away or be construed to take away or impair the right* of any person or persons who have paid or shall hereafter pay money as and for duties, under protest, to any collector of customs, or other person acting as such, in order to obtain goods, wares and merchandise imported by him or them or on his or their account, which duties are not authorized or payable, in part or in whole by law, *to maintain any action at law* against such collector or other person acting as such to ascertain and try the legality and validity of such demand and payment of duties, and *to have a right to a trial by jury, touching the same according to the due course of law;"* with a provision about the time and manner of protest, etc. This was a clear recognition and declaration by Congress that the remedy was not a special remedy given by the statute but an existing common law remedy. In order to successfully invoke this common law remedy the claimant had to show that the taxes sought to be recovered were not voluntarily paid; and Congress added the additional requirement that the protest against payment must be in writing distinctly pointing out the grounds of it and must be made at a certain time.

Like considerations apply to the statutes regulating the refunding of internal revenue taxes illegally or erroneously exacted. As we read these statutes Congress

has prescribed certain conditions upon compliance with which the right to a refund shall exist and has prohibited the bringing of any suit against anybody in any court whatever until such compliance; but it has not prescribed the remedy, that is the kind of action that must be brought, or the person against whom, or the court in which, it must be brought. We make these observations now because they apply equally to expressions from other opinions of the court quoted in the brief for the United States. Whatever view this court may take of their soundness, one thing is clear, and that is that the *Kaufman Case* limited the doctrine announced in the *Nichols Case*.

The decision in the *Kaufman Case* was followed and applied in *United States* v. *Savings Bank*, 104 U. S. 728, to a suit to recover internal revenue taxes after appeal to the Commissioner and allowance by him, the payment of which was refused by the Treasury Department. After setting out the statutes (R. S. Secs. 3220, 3228), and stating the facts, and stating also the holding in the *Kaufman Case* to the effect that "the allowance of a claim by the Commissioner under this section (i. e. Sec. 3426), was equivalent to an account stated between private parties and binding on the United States, until in some appropriate form it was impeached for fraud or mistake and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because such an allowance raised an implied

promise on the part of the United States to pay any amount that might actually be due the claimant, *and also because the claim therefor was founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court*" (Italics ours), it was said:

> "We cannot discover any material difference between the powers of the Commissioner under Section 3426 and those which he has under Section 3220. * * * All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due and put on the Government the burden of showing fraud or mistake" (104 U. S. l. c. 733-4).

What was said in this case about the remedy of the claimant if the Commissioner rejects the claim was not necessary to a decision of the case and is not binding on the court in the case at bar. In connection with the *Kaufman Case* and the *Savings Bank Case* we desire to call the court's attention to the case of *United States* v. *American Tobacco Co.*, 166 U. S. 468, and particularly with reference to what is said in the first two cases about the claimant's remedy in case the Commissioner rejects his claim. The *Tobacco Co. Case* was a suit brought in the Court of Claims to the use of certain insurance companies directly against the United States to recover the value of certain internal revenue stamps,

which had been destroyed by fire before they were used. The action was founded on R. S. Sec. 3426, as amended by the act of March 1, 1879, Ch. 125, Sec. 17 (20 Stat. at L. 327, 349). The claim had been presented to the Treasury Department for allowance according to the law and regulations (except in one particular as to the form of oath required) and had been *rejected* on the ground that the claimant had been paid by the insurance companies for the value of the stamps. Thereafter, the claimant brought suit as stated and recovered judgment in the Court of Claims for the full amount asked, which judgment was affirmed by this court. No question as to jurisdiction was raised in either court. Under the facts of the case, no question of account stated or implied promise by the United States to repay could have been raised, or was raised. The only ground upon which the jurisdiction of the court can be upheld is that the claim was "founded upon a law of Congress" in respect of which claim the claimant "would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States was suable." This would seem to be the ground upon which the suit was maintained as in the opinion it was said (p. 476):

> "The purpose of the statute was to have the Government reimburse the person who had bought and paid for internal revenue stamps which had been destroyed under the circumstances mentioned in the statute, before they had been used. To make such reimbursement would be no loss to the Government, while to retain the amount paid would be

highly inequitable. *The Government recognized this by the passage of the statute in question.*" (Italics ours.)

And again (p. 478):

> "Unless, therefore, the Government repaid the value of these stamps so destroyed or provided other stamps in lieu thereof without any further payment, the Government would be in the position of one who retained money to which it had no equitable right. It would be no answer to that fact to show that some other person had reimbursed the claimant the amount it had paid for the stamps. That would not alter the position of the Government. We cannot think that the payment to the claimant by the insurance companies absolved the Government in the slightest degree from *the duty, under that statute, of paying back the money* which it had received and for which it had delivered stamps that had been destroyed by fire before the contemplated use of them had been made." (Italics ours.)

Swift Company v. *United States*, 105 U. S. 691, S. C. 111 U. S. 22, was a suit in the Court of Claims to recover the amount of certain commissions allowed on purchases of proprietary stamps under the internal revenue laws. The Commissioner of Internal Revenue had refused to allow these commissions, as claimed by the claimant, basing his refusal on his construction of the law, which construction differed from that of the claimant, which latter this court held to be correct. The case was twice in the Court of Claims and twice in this court and the claim was upheld. The question of jurisdiction was not raised.

Campbell v. *United States*, 107 U. S. 407, was a suit brought in the Court of Claims to recover drawbacks on exported articles allowed by the Act of August 5, 1861 (12 Stat. at L. 292). The suit was dismissed by the Court of Claims on the ground that it had no jurisdiction. Its judgment was reversed by this court, and it was said (pp. 410-11):

> "We think the Court of Claims has jurisdiction of such a claim: 1. Because it is founded on a law of Congress; and 2. Because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the Government. * * *
>
> So it is equally clear that this claim is founded on the law allowing drawback.
>
> The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view cannot be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations cannot defeat a right which the act of Congress gives."

Dooley v. *United States*, 182 U. S. 222, upheld the jurisdiction of the Circuit Court, under the Tucker act, of a suit to recover duties paid under protest at San Juan, Porto Rico, upon the ground that it was a claim founded on a law of Congress. It was there said (p. 228):

> "In the cases under consideration, the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the non-

> payment of the duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But, whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely: a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker act, has been repeatedly sustained."

There was a dissent in this case on other questions but none on the question of jurisdiction. The question of jurisdiction, although raised, was not referred to in *Dooley* v. *United States,* 183 U. S. 151, another case between the same parties decided at a later date, and involving the same questions.

In the report of the case of *Chesebrough* v. *United States,* 192 U. S. 253, at page 258, it is stated in the brief for the appellant that "the action was properly brought under the Tucker act," citing the *Dooley Case.* It does not otherwise appear from the report under what law it was brought. It was, however, a suit in the District Court, directly against the United States to recover $600 paid for internal revenue stamps to be affixed to a deed of land as required by the war revenue act of June 13, 1898 (30 Stat. at L. 448, Ch. 448). It was averred in the petition that the claimant had applied to the Com-

missioner of Internal Revenue pursuant to the law and the regulations of the Treasury Department for a refund of the amount so paid, which application was denied. The petition also charged that the act was unconstitutional and void, and prayed judgment. A demurrer to this petition was filed by the United States on the ground that it did "not state facts which would constitute a claim on the part of the claimant against the United States." The demurrer was sustained and the petition dismissed. This judgment was affirmed by this court, on the ground that there was no protest or notice when the stamps were purchased and that their purchase was purely voluntary and that this court found "no right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances."

So far as appears from the report of the case, no contention was made that the court did not have jurisdiction; but on the contrary, the case was considered and disposed of entirely on its merits. If it were the law that, in case of a claim to recover internal revenue taxes, illegally exacted, where payment had been refused by the Commissioner, *the exclusive remedy was a suit against the collector,* the court would undoubtedly have disposed of the case on that ground instead of on its merits.

United States v. *New York & Cuba Mail Steamship Co.*, 200 U. S. 488, was a suit brought in the District Court, under the Tucker act, to recover $240 paid for documentary stamps used on manifests of cargoes on vessels bound for foreign ports, as required by the war

revenue act of June 13, 1898 (30 Stat. at L. 448, Ch. 448). The United States demurred to the petition on the ground that it did not state facts sufficient to constitute a claim against it. The only point considered in the District Court was the constitutionality of the statute. It was held unconstitutional, the demurrer was overruled and judgment rendered for the amount claimed. See 125 Fed. 320. In this court, the United States conceded the unconstitutionality of the statute but contended that the judgment was erroneous because "the stamps were purchased and affixed voluntarily and without protest," and to support this contention cited the *Chesebrough Case*. This contention was sustained, it being said that "all determining conditions, therefore, are the same as in the *Chesebrough Case*." (200 U. S. l. c. 494.)

It was sought to uphold the judgment by reference to the act of May 12, 1900 (31 Stat. at L. 177, Chap. 393); but the court held that such act did not authorize a recovery in case of voluntary payment any more than R. S. Sec. 3220, considered in the *Chesebrough Case*.

The remarks we have made on the question of jurisdiction, with reference to the *Chesebrough Case*, apply equally to the *Steamship Co. Case*.

The court must have been of the opinion that it had jurisdiction in these cases else it would not have entertained jurisdiction and would not have decided the cases on their merits but would, of its own motion, have raised the question of jurisdiction according to its usual custom in such cases.

It was said in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 382:

> "A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter."

This language was used in a case involving the original jurisdiction of this court. But the same rule applies in cases of appellate jurisdiction.

In *Defiance Water Co.* v. *Defiance*, 191 U. S. 184. 194, it was said:

> "The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court whether propounded by counsel or not."

It is submitted that the District Court did have jurisdiction, in the case at bar.

In addition to the cases cited above the attention of the court is called to the following cases, decided by three of the Courts of Appeals, wherein the jurisdiction has been upheld in similar cases.

Christie-Street Com. Co. v. *United States* (C. C. A. 8th C.), 136 Fed. 326.

United States v. *Hyams* (C. C. A. 1st C.), 146 Fed. 15.

United States v. *Finch* (C. C. A. 7th C.), 201 Fed. 95.

II.

The Realty Company Was Not Liable to the Tax.

The applicable provisions of the corporation tax law (Act of August 5, 1909, Sec. 38, 36 Stat. at L., Chap. 6, pp. 11, 112-117), are as follows:

> "That every corporation * * * organized for profit and having a capital stock represented by shares * * * organized under the laws of the United States or of any state * * * and engaged in business in any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations * * * subject to the tax hereby imposed * * *
>
> Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the

year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties * * *

And on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officers, and its treasurer or assistant treasurer, shall be made by each of the corporations * * * subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation * * * has its principal place of business."

The settled construction of this law is that there are two requisites to any liability to this tax, viz: (1) There must be a "corporation, joint stock company or association organized for profit and having a capital stock represented by shares * * * organized under the laws of the United States or some state," etc.; and (2) Such corporation, etc, must be "engaged in business" that is "carrying on or doing business," in some state or territory of the United States, etc., Both of these things must co-exist, or there is no liability. If there is no corporate body of the kind indicated, there is no liability to the tax. On the other hand, if there is a corporate body of the kind indicated, but it is not "engaged in business," is not "carrying on or doing business," there is equally no liability to the tax.

In *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 145, it is said:

> "It is therefore apparent, giving all the words of the statute effect, that *the tax is imposed not upon the franchises of the corporation, irrespective of their use in business*, nor upon the property of the corporation, *but upon the doing of corporate* or insurance *business, and with respect to the carrying on thereof*," etc. Again: "It may be described generally as *a tax upon the doing of business in a corporate capacity*," and again: "In other words, *the tax is imposed upon the doing of business of the character described*," etc. (220 U. S. l. c. 146). Again: "This interpretation of the act, *as resting upon the doing of business*, is sustained by the reasoning in *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S. 397, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business." (220 U. S. l. c. 147). Again: "Within the category of indirect taxation as we shall have further occasion to show, is embraced *a tax upon business done in a corporate capacity, which is the subject matter of the tax imposed in the act under consideration, * * * In the present case the tax is not payable unless there is a carrying on or doing of business in the designated capacity and this is made the occasion for the tax*, measured by the standard prescribed." (220 U. S. l. c. 150). Again: *"If business is not done in the manner described in the statute, no tax is payable"* (220 U. S. l. c. 152). (All italics are ours.)

Applying the principles thus laid down, it was held in the *Flint Case* that certain corporations therein mentioned were liable to the tax. In *Eliot* v. *Freeman*, 220

U. S. 178, it was held that certain real estate trusts, similar to the Boston Ground Rent Trust, under which the realty company holds one of its leases, were not liable to the tax, because they were not corporations, joint stock companies, or associations, organized under the laws of a state, etc.

In *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187. it was held that the corporation there in question was not liable to the tax because it was not doing or carrying on business within the meaning of the act. The last case cannot be distinguished in principle from the case at bar. In every essential particular the two cases are identical. In the *Zonne Case*, the facts were that the Minneapolis Syndicate "was originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor." On December 27, 1906, "the corporation demised and let all of the tracts, lots and parcels of land belonging to it" to certain named persons as trustees "for the term of 130 years from January 1, 1907, at an annual rental of $61000, to be paid by said lessees to said corporation. At that time the corporation caused its articles of incorporation which had theretofore been those of a corporation organized for profit, to be so amended as to read:

> 'The sole purpose of the corporation shall be to hold the title to the westerly one-half of block 87 of the town of Minneapolis, now vested in the corporation, subject to a lease thereof for the term of 130 years from January 1, 1907, and, for the con-

venience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land.'"

On these facts, it was said by Mr. Justice Day, speaking for the court:

> "As we have construed the corporation tax law (*Flint* v. *Stone Tracy Co., supra*), it provides for an excise upon the carrying on or doing of business in a corporate capacity. We have held in the preceding cases that corporations organized for profit under the laws of the state, authorized to manage and rent real estate, and being so engaged, are doing business within the meaning of the law, and are therefore liable to the tax imposed.
>
> The corporation involved in the present case as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented, we are of the opinion that the Minneappolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land, if it should be sold. The corporation had practically gone out of business in connection with the property, and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of the opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909." (220 U. S. l. c. 190, 191).

In the case at bar, the facts are that the Realty Company is a corporation, the purposes of whose formation are:

> "1. To acquire and hold the title to" certain lots; and "to acquire and hold the leasehold interest of the Emery, Bird, Thayer Dry Goods Company" in certain lands described, under certain leases, specifically described.
>
> "2. To carry out and perform all the terms, provisions, covenants and agreements contained in said leases mentioned in paragraph '1' aforesaid, to be kept, carried out and performed by the lessee and its successors and assigns, and for this purpose to make such contracts, to do such acts and incur such indebtedness as may be necessary and proper therefor; to enforce the performance of all the terms, provisions, covenants and agreements of said leases to be kept, carried out and performed by the lessors therein and their successors and assigns, and for this purpose to make such contracts, to do such acts and institute and prosecute such suits as may be necessary and proper therefor.
>
> 3. To lease the property described in paragraph '1' aforesaid and every part thereof, to the Emery, Bird, Thayer Dry Goods Company for such time, upon such terms and for such rental as may be from time to time mutually agreed upon, provided, however, that any such lease shall be made upon such terms and for such rentals as will produce for the benefit of the stockholders of this corporation a net dividend upon the entire capital stock of this corporation of at least six per cent per annum, free and clear of all costs, charges and expenses of every kind whatsoever.
>
> 4. To sell, assign, transfer and convey the property described in paragraph '1' as aforesaid,

> and every and any part thereof, at such times, to such persons and on such terms and at such prices as may be from time to time determined by an affirmative vote of not less than two-thirds of the entire capital stock of this corporation, cast at a stockholders' meeting legally held." (R. 52-54.)

At the time of the incorporation of the Realty Company in 1908, all of the property described in its articles of association was owned by the Dry Goods Company, and was thereafter in 1908, conveyed to the Realty Company. In February, 1908, the Realty Company leased all of said property to the Dry Goods Company for a term of 25 years from January 1, 1908, and the Dry Goods Company entered into possession under said lease, and has since then continuously had exclusive possession and control theerof. The Realty Company has no other property and has done no business since the making of said lease, except to keep up its corporate organization, collect the rents under said lease and distribute them to its stockholders as dividends. It has done nothing which was not done by the Minneapolis Syndicate in the *Zonne Case*, and it has no power to do anything which the Minneapolis Syndicate did not have. Each corporation holds title to certain real estate, subject to a lease, each collects the rents accruing under such lease, and each distributes such rents to its stockholders. It does not appear what were the terms of the lease in the *Zonne Case*, other than as to its duration and the rental reserved; but undoubtedly, there must have been covenants of some kind defining the rights, duties and

liabilities of the parties, and undoubtedly the Minneapolis Syndicate, as lessor was bound to comply with the terms thereof upon its part to be complied with; and was entitled to enforce the terms thereof against the lessees. It must therefore have had the implied power to do all these things. The power that would be implied in that case, is expressed in the articles of association of the Realty Company in subdivision 2, paragraph seventh. These expressed powers, if they had not been expressed, would necessarily have been implied from the power "to acquire and hold" the title and leasehold interests, mentioned in subdivision 1. The power to lease contained in subdivision 3 of paragraph seventh of the Realty Company's articles of association is really a limitation of its powers, because it shuts it up to leasing to a named tenant, on terms expressed. Moreover, this power had been exercised long before the corporation tax law was passed or thought of and thereby it "had wholly parted with control and management of the property" owned by it. Similar considerations apply to subdivision 4 of paragraph seventh. It is a limitation upon the Realty Company's power of sale, requiring a sale to be authorized by "an affirmative vote of not less than two-thirds of the entire capital stock of this corporation cast at a stockholders' meeting legally held." In the *Zonne Case,* there was an implied power of sale, inasmuch as the articles gave the corporation power "to receive and distribute" among the stockholders, "the proceeds of any disposition of said land."

Looking at the two cases from any possible standpoint, they cannot be distinguished in principle, and we submit that the decision in the *Zonne Case* is full and complete authority for a finding in this case for the Realty Company.

The *Zonne Case* was followed and the rule therein laid down was applied in the later case of *McCoach* v. *Minehill and Schuylkill, Haven Railroad Co.*, 228 U. S. 295. This latter case is an even stronger authority than the *Zonne Case* for the support of the judgment in the case at bar, in which the finding is that the Realty Company did no business whatever and in fact did nothing at all except keep up its corporate existence and receive and divide among its stockholders the rentals received from the Dry Goods Company. It had no possession or control of its property, all of which was in the exclusive possession and control of the Dry Goods Company. It had no income except the rentals paid by the Dry Goods Company and no other property or investments from which to receive an income. It paid no salaries or expenses of any kind and made no disbursements of any amounts or for any purposes whatever, except by distributing as dividends to its stockholders, the entire rentals received from the Dry Goods Company. Under both the *Zonne Case* and the *Minehill Case*, therefore, it was not "engaged in business" or "carrying on or doing business," within the true intent and meaning of the law and was not liable for the tax.

In *United States* v. *Nipissing Mines Co.* (C. C. A. 2nd C), 206 Fed. 431, it was held that a corporation organized to own the stock of a mining company and having no assets except such stock, a small amount of money in bank, and office furniture, etc., and doing nothing except receiving dividends from the operating mining company and distributing such dividends among its own stockholders, was not "doing business" within the corporation excise tax law and hence was not liable for the tax.

It is submitted that the judgment of the District Court was right and should be affirmed.

Respectfully submitted,

JAMES G. SMART and
ALBERT R. STROTHER,
Attorneys for Defendant in Error.